No. 91-1502-ATX
Status: GRANTED

Docketed:
March 18, 1992

Vide:
91-1571

Title: Barbara Franklin, Secretary of Commerce, et al., appellants
v.
Massachusetts, et al.

Court: United States District Court for the District of Massachusetts

Counsel for appellant: Solicitor General

Counsel for appellee: Golann,Dwight, Motenko,Neal, Johnson,James, Murray,Michael

Notice of appeal filed March 16. Also motion to expedite

Entry	Date	Note	Proceedings and Orders
1	Mar 18 1992	G	Statement as to jurisdiction filed.
2	Mar 18 1992	P	Application (A91-696) for a stay pending appeal, submitted to Justice Souter.
3	Mar 18 1992	N	Motion of appellants to expedite consideration of the jurisdictional statement filed.
4	Mar 18 1992	N	Motion of appellants to permit filings in typewritten form filed.
6	Mar 18 1992	X	Brief amicus curiae of Washington(TBP) filed.
16	Mar 18 1992	X	Appendix of appellant filed.
5	Mar 19 1992		LODGING submitted by the petitioner received. DISTRIBUTED.
7	Mar 19 1992		Opposition of appellees' to Defendant-Appellants' application for stay. DISTRIBUTED.
8	Mar 19 1992		Memorandum for the appellants in reply to appellees' opposition to application for a stay pending appeal. DISTRIBUTED.
11	Mar 19 1992		(A91-696) Memorandum in reply to response in opposition filed on behalf of Barbara Franklin, Sec. of Commerce, et al.
12	Mar 20 1992		(A91-696) Response in opposition to application for stay filed on behalf of Massachusetts.
13	Mar 20 1992		The motion to expedite consideration of the statement to jurisdiction is granted. In this case probable jurisdiction is noted. The motion to permit filings initially in typewritten form is granted. The joint appendix is to be filed by Wednesday, March 25, 1992. If the State of Washington should wish to file any further papers on the application for stay, it must do so by Wednesday, March 25, 1992. Briefs on the merits are to be filed by the parties with the Clerk of this court and served upon the parties on or before 3 p.m. Monday, April 13, 1992. Replies thereto, if any, are to be filed with the Clerk and served upon the parties on or before 3 p.m. Monday, April 20, 1992. The case is set for oral argument on Tuesday, April 21, 1992. **********
14	Mar 23 1992		(A91-696) Application for stay presented to Justice

No. 91-1502-ATX

Entry	Date	Note	Proceedings and Orders
			Souter and by him referred to the Court. 3/27/92, pag. 14.
15	Mar 25 1992		X Reply memorandum of amicus state of Washington to appellees' opposition to application for stay pending appeal filed.
21	Mar 25 1992		Joint appendix filed.
17	Mar 26 1992		X Reply memorandum of Massachusetts to amicus brief and reply memorandum of State of Washington filed.
18	Mar 27 1992		(A91-696) The application for stay presented to Justice Souter and by him referred to the Court is granted and it is orderd that the judgment of the U.S. District Court for the District of Massachusetts, case No. Civ. 91-11234-WD, is stayed pending disposition of the appeal in this Court. In the event the judgment is affirmed, this order is to terminate automatically. If the judgment is vacated or reversed, this stay is to remain in effect pending the sending down of the judgment of this Court.
19	Mar 30 1992		Record filed.
		*	Original proceedings United States District Court, District of Massachusetts (1 Box)
20	Apr 9 1992	D	Motion of Attorney General of Washington for leave to participate in oral argument as amicus curiae, for divided argument and for additional time for oral argument filed.
22	Apr 13 1992	X	Brief of appellees Commonwealth of Massachusetts, et al. filed. VIDED.
23	Apr 13 1992	X	Brief of appellants Barbara Franklin, Secretary of Commerce, et al. filed. VIDED.
24	Apr 13 1992	X	Brief amicus curiae of Washington (TO BE PRINTED) filed.
25	Apr 13 1992		LODGING of appellees received and distributed.
26	Apr 13 1992	X	Brief amicus curiae of New York, et al. filed.
27	Apr 20 1992		Motion of Attorney General of Washington for leave to participate in oral argument as amicus curiae, for divided argument and for additional time for oral argument DENIED.
28	Apr 20 1992	X	Reply brief of appellant Franklin, Secretary of Commerce (TO BE PRINTED) filed. VIDED.
29	Apr 20 1992	X	Reply brief of appellee Massachusetts, et al.(TO BE PRINTED) filed. VIDED.
30	Apr 21 1992		ARGUED.

(1)

No. 91-1502

FILED
MAR 25 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

BARBARA FRANKLIN, SECRETARY OF COMMERCE, ET AL.,
APPELLANTS

v.

COMMONWEALTH OF MASSACHUSETTS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

JURISDICTIONAL STATEMENT

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

JOHN G. ROBERTS, JR.
Deputy Solicitor General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

MICHAEL JAY SINGER
MARK B. STERN
LORI M. BERANEK
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

The three-judge district court held that the Census Clause of the Constitution (Art. I, § 2, Cl. 3) and the Census Act (13 U.S.C. 141) permit the Secretary of Commerce to include federal personnel stationed abroad (and their dependents) in the state population totals on which the apportionment of Representatives is based. However, the court held that the Secretary's manner of doing so following the 1990 census was arbitrary and capricious, in violation of the Administrative Procedure Act (APA), 5 U.S.C. 706(2)(A), because he did not furnish an adequate justification. The questions presented are:

1. Whether judicial review of the apportionment of Representatives, based on the census including federal personnel stationed abroad, is barred by virtue of the political question doctrine, the APA's exceptions for situations in which "statutes preclude judicial review" and "agency action is committed to agency discretion by law," 5 U.S.C. 701(a), and the inapplicability of the APA to the President.

2. Whether, if judicial review is not barred, the inclusion of federal personnel stationed abroad was arbitrary and capricious.

3. Whether, if the district court correctly found that the Secretary's determination violated the APA, it properly ordered appellants to effect a new apportionment of Representatives with the personnel abroad thrown out of the underlying census count, rather than remanding the matter to the Secretary for further proceedings.

PARTIES TO THE PROCEEDINGS

The appellants herein, who were defendants in the district court, are Barbara Franklin, Secretary of Commerce (substituted as a party pursuant to Rule 35.3 of this Court); Mark W. Plant, Acting Under Secretary of Commerce for Economic Affairs (also substituted pursuant to Rule 35.3); the Bureau of the Census; Barbara Bryant, Director of the Bureau of the Census; and George Herbert Walker Bush, the President of the United States. Donnald K. Anderson, the Clerk of the United States House of Representatives, also was a defendant in the district court.

The appellees in this Court, who were the plaintiffs below, are the Commonwealth of Massachusetts and two of its registered voters, Edward F. Berlin and Karen J. Kepler.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1502

BARBARA FRANKLIN, SECRETARY OF COMMERCE, ET AL., APPELLANTS

v.

COMMONWEALTH OF MASSACHUSETTS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the three-judge district court (App. 1a-84a) and its order denying reconsideration and a stay (App. 85a-93a) are not yet reported.

JURISDICTION

The judgment of the three-judge district court (App. 94a-96a) was entered on February 20, 1992, and the notice of appeal (App. 97a-98a) was filed on March 16, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1253. See note 7.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 2, Clause 3 and Section 8, Clause 18 of the United States Constitution; Sections 2 and 5 of the Fourteenth Amendment; 2 U.S.C. 2a; and 13 U.S.C. 141(a) and (b), are reproduced at App. 99a-103a.

STATEMENT

The Commonwealth of Massachusetts and two of its registered voters brought this suit to challenge, *inter alia*, the decision by the Secretary of Commerce to include in the 1990 census count for each State those federal personnel stationed abroad who designated that State as their permanent "home of record" when they entered the Armed Forces, or who were found to have a sufficient nexus to that State under an alternative standard. The court rejected appellees' contentions that inclusion of federal personnel abroad (and their dependents) in the enumeration on which the apportionment of Representatives is based violates the Census Clause of the Constitution (Art. I, § 2, Cl. 3) and the Census Act (13 U.S.C. 141(b)). However, concluding that the conduct of the census is subject to judicial review under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, the court held that the *manner* of including personnel abroad was arbitrary and capricious, because, in its view, the Secretary of Commerce did not furnish an adequate explanation or factual justification for the method of allocation. Rather than remanding the matter to the Secretary, however, the court ordered appellants to effect a new apportionment of the House of Representatives, with the personnel abroad *excluded*. Under the district court's order, a total of 922,819 people must be eliminated from the apportionment counts. Stipulation of Facts (Stip.) ¶ 53.

1. Article I, Section 2, Clause 3 of the Constitution provides that "Representatives * * * shall be apportioned among the several States * * * according to their respective Numbers." It further provides that "[t]he actual Enumeration shall be made * * * in such Manner as they [the Congress] shall by Law direct." Pursuant to the latter provision, Congress enacted the current Census Act, which directs the Secretary of Commerce to conduct a census, as of April 1 of every tenth year, "in such form and content as [the Secretary] may determine, including the use of sampling procedures and special surveys." 13 U.S.C. 141(a). The Census Act further provides that "[t]he tabulation of total population by States * * * as required for apportionment of Representatives in Congress among the several States shall be completed within 9 months after the census date and reported by the Secretary to the President of the United States." 13 U.S.C. 141(b).

Under the apportionment statute, the President then must transmit to Congress, during the first week of its next Session, "a statement showing the whole number of persons in each State," as ascertained under the decennial census, "and the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives by the method known as the method of equal proportions." 2 U.S.C. 2a(a). The apportionment statute further provides that "[e]ach State shall be entitled * * * to the number of Representatives shown in the [President's] statement." 2 U.S.C. 2a(b). Within 15 calendar days after receipt of the President's statement, the Clerk of the House of Representatives must send to the Governor of each State a certificate of the number of Representatives to which it is entitled under these provisions. *Ibid.*

Following the 1990 census, the Census Bureau tabulated the population by States. The Secretary of Commerce transmitted those results to the President on December 26, 1990, as required by 13 U.S.C. 141(b), along with a calculation of the number of Representatives to which each State is entitled under the method of equal proportions. The President transmitted his statement to Congress on January 3, 1991, and the Clerk of the House of Representatives sent certificates of entitlement to the States based on the President's statement on January 16, 1991. The Clerk certified that the Commonwealth of Massachusetts is entitled to ten Representatives, a loss of one from the 1980 apportionment. App. 2a n.1.

2. Military personnel serving outside the States were first included in the Nation's total population in 1830

and 1840, although their numbers were not allocated to particular States for purposes of apportionment of Representatives. The counting was then discontinued, but was reinstituted in 1900 and continued through the 1960 census. Stip. ¶ 18.

In the 1970 census, the Department of Commerce decided to include overseas military personnel in state population totals for apportionment purposes, using "home of record" data. *Borough of Bethel Park* v. *Stans*, 449 F.2d 575, 581 (3d Cir. 1971). A person designates a "home of record" when enlisting in one of the military services (see DD Form 1966, Box 5); it "reflects the State to which he or she will be moved upon separation."[1] Instructions for completing the enlistment form state that the "home of record" is the address "declared by you to be your permanent home or actual home at time of enlistment," and not a "temporary address." Mot. for Reconsideration, Exh. 3.

The Commerce Department decided to include overseas military personnel in state totals in 1970 because of the large number serving abroad during the Vietnam conflict and strong bipartisan congressional support for doing so.[2] The Commerce Department also relied on a 1969 opinion by then-Assistant Attorney General Rehnquist, who concluded that "the Director of the Census may, in his discretion, validly adopt that procedure." A.R. 15. Assistant Attorney General Rehnquist stated his understanding that the factors that had led to the Director's former practice (difficulties in securing reliable informa-

[1] Congressional Research Service, *The 1990 Census: Including Foreign-Based Military and Civilian Personnel in the State Counts* 4 (June 20, 1990) [hereinafter *CRS Study*] (quoting Defense Management Data Center procedures) (Administrative Record (A.R.) 878).

[2] *Census—Place of Residence: Hearing Before the Subcomm. on Census and Population of the House Comm. on Post Office and Civil Service*, 94th Cong., 2d Sess. 7, 9 (1976) (statement of Robert L. Hagan, Deputy Director, Bureau of the Census) (reproduced at A.R. 41, 43) [hereinafter *1976 Hearing*].

tion and the substantial expense of allocation) had become "largely inapplicable," and that "it has become entirely feasible to make the proposed allocation to home States." *Ibid.* He also found it "reasonable to assume that many, if not most, persons of voting age living abroad vote in their home States and consider themselves to be represented in Congress by members from their home States." *Ibid.*

In the 1980 census, the Commerce Department again included military personnel abroad in the total population of the Nation. It did not, however, include those personnel in the tabulation of state populations for apportionment purposes, because of the smaller size of the overseas population, the practice prior to 1970 of not allocating overseas personnel among the States, and concerns that "[t]he data on 'home State' of those overseas are of an unknown reliability." *1976 Hearing* 7, 9 (A.R. 41, 43).

3. The Commerce Department likewise did not originally plan to include military personnel stationed abroad (and their dependents) in the state totals to be used for apportionment following the 1990 census. A.R. 511-512. By July 1989, however, there was strong bipartisan support in Congress for doing so, and numerous bills were introduced in the 100th and 101st Congresses to mandate that result. Stip. ¶¶ 33, 37. One such bill was H.R. 4720, 100th Cong., 2d Sess., which was introduced on June 1, 1988, by Chairman Dymally of the House Subcommittee on Census and Population. That bill specified that the place of residence for census purposes "shall be considered to be the individual's last place of general abode within the United States for a period of 6 consecutive months or longer." A.R. 361-364. The bill was reported by the House Committee (H.R. Rep. No. 953, 100th Cong., 2d Sess. (1988)), but the House voted not to suspend the rules to permit passage. Stip. ¶ 33. The floor debates show a broad consensus in favor of including overseas personnel in the apportionment counts; the debates in-

stead centered on the manner in which they would be allocated among the States. See 134 Cong. Rec. 25,798-25,804 (1988). Some Members expressed the view that the home State should be based on an individual's "home of record," rather than his last abode of six months, *id.* at 25,799-25,800 (Reps. Ridge and Goodling), noting that the latter test "would drastically skew the census toward those few States with a large number of military bases." *Id.* at 25,801 (Rep. Kennelly); see also *id.* at 25,803 (Rep. Green); *id.* at 25,803-25,804 (Rep. Petri).

4. On July 31, 1989, the Secretary of Commerce decided to count federal personnel abroad for apportionment purposes in 1990. A.R. 511-512. The Secretary noted that the Defense Department "believes strongly that its employees should not be excluded from apportionment counts because of temporary and involuntary residence overseas." A.R. 511. He also relied on the growing bipartisan concern of Congress; the Defense Department's assurance that it was feasible to provide the necessary counts of overseas military personnel and their dependents in time to meet the December 31, 1990, deadline for reporting to the President; the precedent of including overseas military personnel in 1970; and Assistant Attorney General Rehnquist's 1969 opinion that the Department enjoyed the discretion to do so. A.R. 511-512.

At the time the Secretary decided to include overseas personnel, the Commerce Department planned to use data derived from an enumeration to be conducted by the Defense Department. Due to a lack of funding and other constraints, however, the Defense Department abandoned that option in December 1989. Stip. ¶ 46; A.R. 787. Attention then turned to developing an alternative approach, based on existing Defense Department data. At that point, the Commerce Department chose to count military personnel based on their last address in the United States of at least six months' duration, although it expressed its willingness to utilize "home of record" data if the Defense Department reexamined available evi-

dence and furnished an acceptable methodology by October 31, 1990. A.R. 830-835.

In the meantime, congressional support for use of "home of record" data intensified. For example, in a letter dated April 5, 1990, four Members of Congress urged the Director of the Census Bureau to adopt the "home of record" method, rather than the individual's last residence in the United States (A.R. 811-812):

> Upon entering the service, each member of the armed services must indicate a "home of record." This home of record will remain constant throughout the enlistment period and reflects the state where the individual resided prior to enlistment. Upon discharge from service, the individual is granted a moving stipend to cover the expense of moving from the point of discharge back to the home of record.
>
> * * * The only administrative listing which would best describe the residence of our members of the armed forces stationed abroad is the home of record. After all, the state listed for the home of record is the last location at which the members of the armed forces *CHOSE* TO RESIDE. In a very real sense, those states had this population taken from them by federal action.

On May 23, 1990, two bills, H.R. 4903 and S. 2675, 101st Cong., 2d Sess., were introduced to require the Census Bureau to assign members of the military stationed abroad to home States using their "homes of record." The House Report on the former expressed the view that members of the Armed Forces and their dependents stationed overseas "are entitled to representation in Congress and should be included in the population figures used for apportionment of the House of Representatives," and it recommended counting them on the basis of their homes of record because that information "most closely approximates the home State of individuals who are highly mobile, not by choice, but by virtue of their service to their country." H.R. Rep. No. 552, 101st Cong., 2d

Sess. 2 (1990). The House passed H.R. 4903 under a suspension of the rules on June 26, 1990. 136 Cong. Rec. H4195-H4197 (daily ed.). The companion Senate bill was scheduled for consideration by the Senate committee in the near future. A.R. 862, 863, 919.

In light of these developments, the Commerce Department decided to revisit the question of the most appropriate method of allocating overseas military personnel among the States for apportionment purposes. The Census Bureau accordingly evaluated the three methods for which data were available in Defense Department records: legal residence, home of record, and last duty station in the United States. A.R. 921. After doing so, the Associate Director of the Bureau in charge of the Decennial Census reported that in view of all the currently available information, "the technical staff of the Census Bureau believes that the Home of Record comes closest to the concept of the Usual Residence among the three data sources that DoD has available." A.R. 924. The concept of "usual residence" has been the guiding principle in formulating enumeration and residence rules since the first census in 1790. As applied by the Commerce Department, it provides that persons should be included in the census counts at the place where they live and sleep most of the time as of the census date, although persons who are occasionally or temporarily absent are often counted at their homes. App. 59a, 60a-61a n.24, 80a-81a; Stip. ¶¶ 4, 5.

The Under Secretary agreed with the Census Bureau and recommended to the Secretary that the "home of record" method be adopted, A.R. 919, especially since the Defense Department had represented that its existing data (in which gaps had been identified) "would be supplemented and improved by methodologies devised by technical experts who designed the overseas enumeration." A.R. 920. As a result, he concluded, home of record data "will constitute the most accurate data available from the Department of Defense." A.R. 919.

The Under Secretary acknowledged that a recent letter from Assistant Secretary of Defense Jehn to Representative Aspin had stated that the last duty station in the United States most closely approximates the "usual residence" concept. But the Under Secretary explained that "because last duty station merely reflects the location of the facility to which a person is assigned, many military personnel and their dependents would be counted in states other than their actual previous U.S. residence (such as those assigned to the Pentagon, who would be counted as D.C. residents even though they lived in Maryland or Virginia)." A.R. 921. The Under Secretary also explained that the option of using legal residence was rejected because in many cases legal residence—which is declared by a member of the Armed Forces for tax purposes (*CRS Study* 4 (A.R. 878))—does not necessarily reflect a substantial nexus to the State. A.R. 921; see also A.R. 932 (a person may designate as his legal residence "a place where [he] was assigned at any point during military service, no matter how brief the assignment or how distant in time").[3]

[3] The Congressional Research Service had also studied the three available methods for allocating military personnel stationed abroad to particular States, and found that each has its advantages and disadvantages. See *CRS Study* 5 (A.R. 879). Thus, it concluded that the home of record "may well reflect the person's own concept of his or her home State," although he or she may not return to that State at the end of the term of service; legal residence "reflects the State to which the person chooses to pay his or her taxes, but a person may choose a low or no tax State to claim as a legal residence"; and although last duty station may reflect where the person last resided and thus be comparable to the Census Bureau's usual residence rule, it may not actually indicate the State where a person lives because it "may be in a different State than where he or she resides." *CRS Study* 5-6 (A.R. 879-880). The *CRS Study* also found that allocating military personnel among the States according to home of record is "closest to the population distribution of the entire population," whereas an allocation based on legal residence varies from the distribution of the entire population nearly three times as much as home of record and an allocation based on last duty station varies ten times as much. *CRS Study* 6 (A.R. 880).

The Under Secretary communicated the Department's reasoning in letters to a number of Members of Congress on July 23, August 7, and September 11, 1990. A.R. 925-942. He also noted that although approximately 7% of overseas personnel records lacked a home of record designation, the Defense Manpower Data Center planned to "use supplemental data from their automated records" to fill the gap and that, as a result, "the number of missing state designations will be negligible." *Ibid.*[4]

5. On May 1, 1991—almost four months after it received its certificate of entitlement to ten Representatives—the Commonwealth of Massachusetts and two of its registered voters filed this suit in an effort to retain Massachusetts' eleventh Representative. They challenged (1) the equal proportions method prescribed by 2 U.S.C. 2a for apportioning Representatives among the States (an issue that is already before this Court in *United States Dep't of Commerce* v. *Montana*, No. 91-860 (argued Mar. 4, 1992)), and (2) inclusion of federal personnel stationed abroad in the population totals used for apportioning Representatives among the States. Because appellees challenged the apportionment of Congress on constitutional grounds, a three-judge district court was convened under 28 U.S.C. 2284(a). App. 5a-14a.

a. The court rejected appellees' constitutional challenge to the equal proportions method for apportioning Representatives among the States. It therefore disagreed with the holding by the three-judge district court in the *Montana* case that the equal proportions method is unconstitutional. App. 27a-56a.

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[4] If the Defense Department did not have a home of record for a member, his home State (and that of his dependents) was determined on the basis of his legal residence, with last duty station being used if legal residence also was not available. Stip. ¶ 56. The home States of Defense Department civilian employees (and their dependents) were determined through responses to questionnaires. A.R. 944. The home States of overseas employees of other federal agencies (and their dependents) were based on the agencies' responses, drawn from data in their records, to a form provided by the Census Bureau. Stip. ¶ 57.

b. The district court also rejected appellees' contention that because Section 2 of the Fourteenth Amendment refers to the counting of persons "in each State," inclusion of federal personnel stationed abroad violates the Constitution. App. 79a-81a. The court explained that the notion that the apportionment may "only be based on a person's actual physical presence in a state on census day * * * finds no support in the case law," which instead interprets the "in each State" language to refer to actual inhabitants of the State—"that is, persons with some relation to the state," not "simply those physically in the state on census day." *Id.* at 80a. Thus, in *Bethel Park* (which rejected the contention that federal personnel stationed abroad had to be assigned to particular locations *within* a State following the 1970 census) the court found "no indication that the members of the Constitutional Convention had in mind any specific criteria by which persons were to be deemed residents of one state rather than another," and that "[i]t is most likely that [the Framers] thought in terms of an average inhabitant." App. 80a (quoting 319 F. Supp. 971, 974 (W.D. Pa. 1970)). As a result, the court below continued, "[a]llocation of what the *Bethel Park* court referred to as the 'fringe' populations has long been considered a discretionary decision open to revision as time unfolded and circumstances developed." App. 80a; see also *id.* at 81a (quoting 41 Op. Att'y Gen. 31, 33 (1949)).

The court pointed out that in addition to military personnel, other subclasses of persons (such as boarding school and college students, other Americans abroad, and crew members of vessels at sea) also present the problem of how to account for people who are away from what might be considered their domicile or legal residence on the census date. The court noted that "[c]ensus administrators have developed various methods for dealing with the[se] subclasses"—methods that "have reflected contemporary societal views about what location should be designated as the 'usual residence' for such a person and the administrative practicability and accuracy of making

a count of a member of the subclass at a particular location." App. 60a-61a n.24. In the court's view, this "flexibility of the 'usual residence' concept as applied by the Census Bureau over the years * * * demonstrates the broad discretion the Bureau has traditionally enjoyed to interpret what the phrase 'in each state' means." *Id.* at 81a.

c. The court likewise rejected appellees' contention that inclusion of federal personnel stationed abroad in state population totals violates the Census Act. App. 81a n.31. It noted that 13 U.S.C. 141(a) provides for the Secretary of Commerce to conduct the decennial census "in such form and content as he may determine." That language, it reasoned, "gives the Secretary broad discretion to determine how the census will be carried out, discretion which mirrors the broad mandate given to Congress" by Article I, Section 2, Clause 3 to provide for the enumeration "in such Manner as they shall by Law direct." App. 81a n.31. The court was unpersuaded by appellees' argument that although 13 U.S.C. 141(a) gives the Census Bureau discretion to determine *how* to conduct the census, it severely circumscribes the Bureau's discretion to determine *who* shall be counted for purposes of apportionment; in the court's view, "in determining how the census is to be carried out, the Bureau necessarily must determine who shall be counted, *i.e.*, the 'content' of the census." App. 81a n.31. The court therefore concluded that "[t]he policy decision to apportion overseas federal employees is well within the discretion afforded the Census Bureau under the Census Act." *Ibid.*

d. Despite its holding that inclusion of federal personnel abroad (and their dependents) violates neither the Constitution nor the Census Act, the district court nevertheless invalidated the Secretary's determination to do so for the 1990 census. Finding a violation of the APA, the court rejected appellants' position that the Secretary's determination to count overseas personnel on the basis of their homes of record and comparable data is not subject to judicial review under the APA because that matter is

"committed to agency discretion by law." 5 U.S.C. 701(a)(2). It recognized that 13 U.S.C. 141(a), by providing for the Secretary to conduct the census "in such form and content as he may determine," "is plainly drawn in discretionary terms" and "fairly exudes deference." App. 70a (quoting *Webster* v. *Doe*, 486 U.S. 592, 600 (1988)). But, observing that the census "can be profoundly influential in the balance of advantage among competing partisan and parochial interests," the court found it "especially appropriate to have some review by the courts, as the distinterested branch of government." App. 71a. The court believed that in this case, the "usual residency" policy that has been followed since 1790 furnished adequate standards for judicial review. *Id.* at 70a, 71a. The court also noted that other courts had reviewed census determinations under the APA's arbitrary and capricious standard. *Id.* at 68a-69a.

On the merits, the court condemned the Secretary's manner of including federal personnel abroad as arbitrary and capricious. App. 75a-79a. The court surmised that the Secretary decided in July 1989 to include overseas personnel only because the Defense Department planned to conduct a special enumeration that was expected to generate reliable data. The court stated that if the Secretary's decision-making were complete at that time, it "would not be prepared to say that his decision was arbitrary and capricious." *Id.* at 76a. But the court faulted the Census Bureau for proceeding to include personnel abroad after the Defense Department cancelled its plans for the enumeration. *Id.* at 76a-79a. The court attributed that course to "inertial forces" that did not permit consideration of reverting to the policy of not including personnel abroad in the state totals, despite what the court regarded as deficiencies in the home of record data and its belief that the administrative record did not dispel misgivings previously expressed by the Census Bureau and Defense Department about the home of record and other methods. *Id.* at 76a-77a.

Rather than remanding the matter to the Secretary for further proceedings, the court ordered the Executive Branch defendants, by March 31, 1992, to submit to the Clerk of the House of Representatives a statement showing the number of Representatives to which each State would be entitled as a result of the 1990 census under 2 U.S.C. 2a without inclusion of personnel abroad. The court further ordered the Clerk of the House of Representatives, by April 10, 1992, to send to the Governor of each State a recertification of the number of Representatives to which it is entitled under the district court's decision. App. 95a.[5] If allowed to stand, the district court's judgment will result in the loss of one Representative by the State of Washington and a gain of one by Massachusetts. Stip. ¶ 42.[6]

THE QUESTIONS ARE SUBSTANTIAL

The district court greatly exceeded its authority by ordering appellants to eliminate a total of 922,819 people from the 1990 census tabulation and to effect a reapportionment of the House of Representatives—even though the court held that inclusion of federal personnel stationed abroad in state population totals violates neither

[5] These requirements were conditioned upon the Massachusetts Legislature's enactment, by March 30, 1992, of a law redistricting the Commonwealth into eleven congressional districts, rather than the ten it was apportioned under the President's January 3, 1991, statement. App. 95a-96a. That condition has been satisfied: on March 13, 1992, the Commonwealth certified to the district court that the Governor had signed such a law. *Id.* at 91a.

[6] On March 5, 1992, appellants filed motions for reconsideration and for a stay pending reconsideration and appeal. The motion for reconsideration was accompanied by declarations by Charles D. Jones, the Associate Director of the Census Bureau for the Decennial Census, and Carl J. Dahlman, the Deputy Assistant Secretary of Defense for Requirements and Resources, which sought to explain the material in the record concerning the determination to count overseas personnel on the basis of their homes of record and comparable data. By order dated March 13, 1992, the district court denied the motions for reconsideration and a stay, and granted appellees' motion to strike the declarations. App. 85a-93a.

the Constitution nor the Census Act. That order constitutes an unprecedented intrusion into matters textually committed by the Constitution to Congress and, in turn, committed by Congress to the President, the Secretary of Commerce, and the Clerk of the House, without any provision or standards for judicial review and under strict deadlines and procedures that foreclose it. Judicial review of the conduct of the census under the APA therefore is barred both because "statutes preclude judicial review" and because "agency action is committed to agency discretion by law." 5 U.S.C. 701(a). Indeed, the President, whose statement to Congress determines the number of Representatives to which each State is entitled under 2 U.S.C. 2a, is not an "agency" whose actions are subject to judicial review under the APA.

Assuming arguendo that the conduct of the census is subject to judicial review under the APA, the district court plainly erred in holding that the Secretary of Commerce's method of including federal military and civilian personnel abroad in the enumeration was arbitrary and capricious. The "home of record" data on which the allocation of most military personnel was based represents the person's permanent or usual residence upon entering the service; the other bases the Secretary relied upon in the absence of "home of record" data are also reliable and sound. But even if we further assume, arguendo, that the district court correctly concluded that the Secretary had not adequately justified his method of including personnel abroad, the proper disposition was to vacate the Secretary's decision and remand for further proceedings. The court had no authority to order that federal personnel abroad be thrown out of the tabulation of state populations for 1990, much less to order the President to submit a new statement of apportionment to Congress.

The legal issues presented by this case are of paramount importance to the structure of the Government. The judgment below affects the number of Representatives to which Massachusetts and Washington will be en-

titled in Congress and the number of Presidential electors to which each will be entitled in the 1992 election. Accordingly, this case, like *Montana*, warrants review this Term, so that these and other States may confidently implement a final apportionment of their congressional districts. The Court therefore should promptly note probable jurisdiction and set the case for briefing and argument this Term.[7]

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[7] Under 28 U.S.C. 1253, "any party may appeal to the Supreme Court from an order granting or denying * * * [a] permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges." A three-judge court was properly convened in this case pursuant to 28 U.S.C. 2284(a), which states that such a court "shall be convened * * * when an action is filed challenging the constitutionality of the apportionment of congressional districts." As we explain in our jurisdictional statement in the *Montana* case (91-860 J.S. 25-27), that statute applies to challenges to the apportionment of Representatives pursuant to 2 U.S.C. 2a. Appellees raised two constitutional challenges to the apportionment made by the President's January 3, 1991, statement to Congress pursuant to 2 U.S.C. 2a. One of those constitutional challenges was to the inclusion of federal military and civilian personnel stationed overseas. Because the district court enjoined that inclusion (albeit on APA grounds), a direct appeal from the judgment below may be taken to this Court. See, *e.g.*, *Alexander* v. *Fioto*, 430 U.S. 634, 636 (1977); *Engineers* v. *Chicago, R.I. & P.R.R.*, 382 U.S. 423, 428 (1966); *Zemel* v. *Rusk*, 381 U.S. 1, 5-6 (1965); see also *Dothard* v. *Rawlinson*, 433 U.S. 321, 324 n.5 (1977).

If the Court disagrees with our position on this Court's jurisdiction, the appeal from the district court's judgment lies in the First Circuit. Accordingly, out of an abundance of caution, we have also filed a protective notice of appeal to the First Circuit. And to ensure that the Court can enter a decision this Term, we shall also file a protective petition for a writ of certiorari before judgment to the First Circuit, pursuant to 28 U.S.C. 1254(1). As a result, if the Court should conclude at any stage that it does not have jurisdiction over this appeal, it may grant the certiorari petition in order to render a decision on the merits. See *Turner* v. *City of Memphis*, 369 U.S. 350, 353 (1962); *Stainback* v. *Mo Hock Ke Lok Po*, 336 U.S. 368, 371 (1949). We took similar precautions in the *Montana* case. See 91-860 J.S. 28 n.22.

A. The district court erred in holding that inclusion of federal personnel abroad in state population totals based on "home of record" or comparable data is subject to judicial review under the APA.

1. The text of the Constitution commits the choice of the methods by which the census is conducted and Representatives are apportioned to the discretion of Congress. Article I, Section 2, Clause 3 requires that "Representatives * * * shall be apportioned among the several States * * * according to their respective Numbers." Although the quoted language does not expressly so provide, it has always been understood to vest the power to apportion Representatives in Congress. *Prigg* v. *Pennsylvania*, 41 U.S. (16 Pet.) 539, 619 (1842). In *Montana*, we argue that under the factors identified in *Baker* v. *Carr*, 369 U.S. 186, 217 (1962), Congress's exercise of that power is subject to judicial review only to determine whether it is plainly contrary to an explicit textual limitation. Accordingly, Congress's selection from among apportionment methods that are rationally tied to the "respective Numbers" of the States presents a political question not reviewable by the courts. 91-860 Gov't Br. 24-34; 91-860 Reply Br. 3-8.

The political question analysis set forth in our *Montana* briefs applies a fortiori here, especially since the district court held that the counting of personnel abroad violates no explicit constitutional limitation. Article I, Section 2, Clause 3 directs that the "actual Enumeration shall be made * * * in such Manner as they [the Congress] shall by Law direct." As a result, "responsibility for conducting the decennial census rests with Congress," *Baldrige* v. *Shapiro*, 455 U.S. 345, 347-348 (1982), and the quoted text contains no "judicially discoverable and manageable standards" for resolving a challenge to the manner Congress prescribes.

Moreover, with respect to the issue in this case, the selection of appropriate criteria for allocating overseas personnel among the States requires "an initial policy determination of a kind clearly for nonjudicial discre-

tion." *Baker* v. *Carr*, 369 U.S. at 217. In fact, the district court noted with approval that methods for counting various subclasses of people who are away from their domicile or legal residence on the census date "have reflected contemporary societal values" and the "administrative practicability and accuracy of making a count of a member of the subclass at a particular location" (App. 60a-61a n.24)—judgments of a distinctly "legislative" nature that are beyond the expertise of a court to make. For these reasons, if Congress itself had "direct[ed]" that the "actual Enumeration" of federal military personnel stationed overseas be made "in such Manner" as to include them in state populations based on their home of record, that legislative judgment would not be subject to review by the courts. An "independent resolution" of such an issue by a court would "express[] lack of the respect due [a] coordinate branch[] of government" on a matter so central to its political character as the data on which the allocation of its Members is based. *Baker* v. *Carr*, 369 U.S. at 217.[8]

[8] Here, as in *Montana*, the remaining *Baker* v. *Carr* factors further support the political question analysis. See 91-860 Gov't Br. 31-34; 91-860 Reply Br. 7 & n.5. Review by various courts of the census counts underlying the apportionment would interfere with the mechanism prescribed by Congress for apportioning Representatives among the States, and would, as a result, disrupt, confuse and delay apportionment of congressional districts within the States. See pages 23-24, *infra*. There accordingly is "an unusual need for unquestioning adherence to a political decision already made." 369 U.S. at 217.

In addition, as the judgments in this case and *Montana* vividly illustrate, litigation such as this creates a grave "potentiality of embarrassment from multifarious pronouncements by various departments on one question" (369 U.S. at 217): the judgment in *Montana* expressly *bars* the appellants in that case from effecting an apportionment under 2 U.S.C. 2a (91-860 J.S. App. 47a-48a), while the judgment in this case expressly *requires* a new apportionment pursuant to that statute (App. 95a). Still other suits have been brought to require the Secretary to adjust the census total to compensate for a disparate undercount in various States. See, *e.g.*, *Tucker* v. *United States Dep't of Commerce*, No. 91-2051 (7th Cir. Mar. 16, 1982), discussed below and at pages 21-22, *infra*. Accordingly, the proper forum for correction of any deficiencies in the conduct of the census is Congress, where all States are represented and a dispositive resolution may be promptly enacted, rather than in separate lawsuits in separate courts.

2. There is no basis for a different result here simply because the determination to include overseas federal personnel based on their homes of record or comparable data was made by the Secretary of Commerce, rather than by Congress itself. Congress has directed the Secretary to take the decennial census "in such form and content as he may determine." 13 U.S.C. 141(a). As the district court itself correctly observed, this language "gives the Secretary broad discretion to determine how the census will be carried out, discretion which mirrors the broad mandate given to Congress" under Article I, Section 2, Clause 3. App. 81a n.31. Because Congress's exercise of its own power under the Census Clause of the Constitution is not subject to judicial review, the directly parallel

Nonetheless, the Seventh Circuit held in *Tucker* that a challenge to the Secretary's decision not to make a statistical adjustment of the census totals did not present a political question. It believed that a challenge to the accuracy of the census would not require the judiciary "to adjudicate questions that the Constitution has placed within the exclusive jurisdiction of another branch of government, or to disregard traditional limits on equitable relief." Slip op. 7-8. As we have explained in the text, however, the Constitution *does* grant Congress exclusive jurisdiction over the conduct of the census; and although Congress has assigned that responsibility to the Secretary, it has not assigned any role to the courts. The *Tucker* court also could not square application of the political question doctrine in cases involving challenges to the census with the rejection of that doctrine in apportionment cases such as *Baker* v. *Carr* and *Davis* v. *Bandemer*, 478 U.S. 109 (1986). Slip op. 7, 8. That observation ignores the critical point that the political question doctrine derives from the "the relationship between the judiciary and the coordinate Branches of the Federal Government" and is "essentially a function of the separation of powers." *Baker* v. *Carr*, 369 U.S. at 210, 217. *Baker* v. *Carr* and *Davis* v. *Bandemar* did not present those concerns, because they involved challenges to apportionments by state legislatures. By contrast, this case, like *Montana*, involves a challenge to action by the political Branches of the Federal Government.

language in 13 U.S.C. 141(a) strongly indicates that Congress likewise did not intend that the exercise of the power it delegated to the Secretary would be subject to review, or that the apportionment based on the census conducted by the Secretary could be set aside by a court. In fact, the Census Act and apportionment statute, especially when read together, foreclose APA review here.

a. In the first place, whether to use "home of record" data to allocate overseas personnel among the States is "committed to agency discretion by law." 5 U.S.C. 701(a)(2). Even when Congress has not expressly precluded judicial oversight, "review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Heckler* v. *Chaney*, 470 U.S. 821, 830 (1985). See *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 410 (1971) (action is committed to agency discretion by law where "statutes are drawn in such broad terms that in a given case there is no law to apply") (quoting S. Rep. No. 752, 79th Cong., 1st Sess. 26 (1945)). In this case, the applicable statute, 13 U.S.C. 141(a), contains no standards for determining on what basis the Secretary may include federal personnel stationed abroad in the tabulation of state populations. To the contrary, its language is at least as deferential as that at issue in *Webster* v. *Doe*, 486 U.S. 592, 599-601 (1988), under which the Court found that judicial review was unavailable under the APA's "agency discretion" exception.[9]

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[9] *Webster* involved a statute which, as the Court explained (486 U.S. at 600)

> allows termination of an Agency employee whenever the Director "shall *deem* such termination necessary or advisable in the interests of the United States" (emphasis added), not simply when the dismissal *is* necessary or advisable to those interests. This standard fairly exudes deference to the Director, and appears to us to foreclose the application of any meaningful judicial standard of review.

Compare 13 U.S.C. 141(a) ("The Secretary shall * * * take a decennial census * * * in such form and content as he may determine.").

Although the district court agreed that 13 U.S.C. 141(a) "is plainly drawn in discretionary terms" and that—standing alone—it "fairly exudes deference," App. 70a (quoting *Webster* v. *Doe*, 486 U.S. at 600), it found that the statutory structure "has been refined further by the 'usual residence' policy that has governed census determinations since the First Census Act." App. 70a. The court failed, however, to appreciate the significance of the fact that while that policy was explicitly embodied in the First Census Act's reference to "usual abode" (Act of Mar. 1, 1790, ch. II, § 5, 1 Stat. 103), it is not mentioned in 13 U.S.C. 141(a). While the Census Bureau has pursued a "usual residence" policy over the years, the absence of any reference to it in the statutory text underscores that the articulation and application of the policy, and the nature of the factual basis on which it may be invoked in particular circumstances, are committed to the Census Bureau's discretion.

The numerous determinations of a technical and policy nature that must be made in planning for and compiling the results of an undertaking so massive as the enumeration of 250 million persons throughout the country and abroad further reinforce the conclusion that Congress committed that task—both in general and in its myriad particulars—to the sound judgment and discretion of the Secretary. Recognition of a right of judicial review under the APA would invite the courts to micromanage the census and invite States and individuals who believe they have been shortchanged to sift through the census plan and its implementation to find just the right "defect"—namely, one whose "correction" would work to their advantage. The rash of suits following the past three censuses underscores that potential.

In a similar case (and for similar reasons), the Seventh Circuit recently held that the Secretary's decision not to make a statistical adjustment of the census totals to compensate for an alleged undercount in certain States may not be challenged under the APA. *Tucker* v. *United*

States Dep't of Commerce, No. 91-2051 (Mar. 16, 1992). The court held that the Census Act does not confer litigable rights on persons claiming to be injured by the conduct of the census. Slip op. 9-15. Of particular relevance here, the court noted that 13 U.S.C. 141 and 2 U.S.C. 2a "say nothing about how to conduct a census or what to do about undercounts," but rather are so "nondirective" that "it is arguable that there is no law for a court to apply in a case such as this." Slip op. 12 (citing *Webster*, *Chaney*, and *Overton Park*). The district court in this case should have reached the same conclusion. Indeed, the Seventh Circuit in *Tucker* expressed doubt about the correctness of the decision in this case. See slip op. 13. *Tucker* therefore highlights the need for guidance from this Court.

b. Moreover, under the governing statutory scheme, it is action by the President, not the Secretary of Commerce, that determines the apportionment of Representatives. Under subsection (a) of 2 U.S.C. 2a, the President must transmit to Congress a statement showing the whole number of persons in each State and the number of Representatives to which it would be entitled under the method of equal proportions. 2 U.S.C. 2a(a). Subsection (b) then provides that "[e]ach State shall be entitled * * * to the number of Representatives shown in the statement required by subsection (a)"—*i.e.*, the *President's* statement.

As the D.C. Circuit held in *Armstrong* v. *Bush*, 924 F.2d 282 (1991), the President is not an "agency" within the meaning of the APA. The D.C. Circuit correctly reasoned that although 5 U.S.C. 701(b)(1) does not expressly exclude the President, the APA should not be read to apply to his actions, in view of the textual silence, the legislative history of the APA, the "longstanding practice" of the Executive Branch, and the "compelling reasons" for requiring a "clear statement" of congressional intent where a statute would implicate separation of powers concerns. 924 F.2d at 288-289; see also *Mississippi* v. *Johnson*, 71 U.S. (4 Wall.) 475 (1866). Accordingly, the APA, and the presumption of judicial review it sets forth (see 5 U.S.C. 702), do not support the core relief sought by appellees and granted by the district court—namely, an injunction requiring the President to submit a new apportionment statement to Congress pursuant to 2 U.S.C. 2a. See also pages 27-29, *infra*.

c. Other features of the census and apportionment statutes lead to the same conclusion. Those features bring this case squarely within the APA's exception for situations in which "statutes preclude judicial review." 5 U.S.C. 701(a)(1). First, the Census Act does not direct the Secretary of Commerce to publish the tabulation of state populations to the public at large, which would be expected if Congress had intended to permit the tabulation to be challenged in court by a member of the public (or the State in which he resides). Rather, the Act provides that the tabulation shall be "reported by the Secretary to the President of the United States." 13 U.S.C. 141(b). The fact that the Act contemplates further action by the President strongly implies that the Secretary's "report" is not a proper subject of judicial review under the APA. Cf. *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103 (1948).

Second, the time limits in the Census Act foreclose any opportunity for judicial review. The Secretary must submit his report to the President within nine months of the census date (*i.e.*, by December 31), and the President then must transmit his statement to Congress during the first week of the next Session of Congress, which typically commences on January 3. 2 U.S.C. 2a(a). Within fifteen days, the Clerk of the House then must send to the Governor of each State a certificate of the number of Representatives to which it is entitled. The whole point of this expedited schedule is to ensure that state legislatures are able to enact redistricting legislation immediately.[10] It is

[10] See 86 Cong. Rec. 4369, 4370, 4485-4486 (1940) (Rep. McLeod). Representative McLeod made the cited remarks in support of his floor amendment in 1940 (which was adopted by the House and

fundamentally incompatible with the certainty that Congress intended to assure for a court to review and set aside the apportionment made by the President's statement *after* the Clerk has informed the States of their entitlements. And the strict time limits preclude judicial review prior to that time. *Morris* v. *Gressette*, 432 U.S. 491, 500-504 (1977); see also *Southern Ry.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444, 457 (1979); *Adams* v. *Nagle*, 303 U.S. 532 (1938); *American Bank, N.A.* v. *Clarke*, 933 F.2d 899 (10th Cir. 1991).

Third, the fact that the operative action by the President takes the form of a statement addressed to Congress suggests that any defects that may be perceived in that statement (or the census data on which it is based) are to be addressed *by* Congress, not by members of the public or the courts in suits brought against Executive Branch officers after the statement has been transmitted. That is clear from the text of 2 U.S.C. 2a(b), which provides that "[e]ach State *shall be entitled*, * * * until the taking effect of a reapportionment under this section *or subsequent statute*, to the number of Representatives shown in the President's statement" (emphasis added). By expressly reserving to itself the power to alter the apportionment in a "subsequent statute," Congress foreclosed the courts from setting aside the "entitlement" conferred on a State by the President's statement.[11] This

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Congress, Act of Apr. 25, 1940, ch. 152, § 2, 54 Stat. 162) to require the Clerk to send the certificates within 60 days of receipt of the President's statement, rather than at the end of the Session of Congress, as the Census Act of 1929 provided. Act of June 18, 1929, ch. 28, § 22, 46 Stat. 26-27. In 1941, the time period was compressed to fifteen days (Act of Nov. 15, 1941, ch. 470, § 2(b), 55 Stat. 762), thereby heightening the interest in expedition.

[11] Congress enacted such a provision in 1941, when it adopted the method of equal proportions in 2 U.S.C. 2a. By the time the 1941 Act was passed, the apportionment made pursuant to the President's statement had already become effective because of the passage of 60 days. Congress not only mandated use of the equal proportions method on a prospective basis (for the 1950 census apportionment and beyond); it also mandated its use "retroactively" to the 1940 census by requiring that new certificates to be sent—which benefited Arkansas at the expense of Michigan. See Act of Nov. 15, 1941, ch. 470, § 2(a), 55 Stat. 762; 2 U.S.C. 2a, 2b; 91-860 Gov't Reply Br. 13-14.

conclusion is reinforced by the nature and purpose of the actions the court below set aside, for technical and policy decisions that bear on apportionment of the House of Representatives clearly involve the sort of "sensitive and inherently discretionary judgment call[s]" in which courts ordinarily have no role. *Department of the Navy* v. *Egan*, 484 U.S. 518, 527 (1988); cf. *Coleman* v. *Miller*, 307 U.S. 433 (1939).

B. Even if the Secretary's determination to include federal personnel abroad in the enumeration and to allocate them to States based on their "homes of record" or comparable data is not altogether insulated from judicial review, that determination certainly was not arbitrary and capricious.

The district court specifically found that it is "well within the discretion afforded the Census Bureau under the Census Act" to assign overseas federal personnel to the States for apportionment purposes. App. 81a n.31. The only remaining question, then, concerned the Secretary's selection of an appropriate method for making that assignment. Where, as here, determinations must be made about the quality of available data and choices among possible alternatives, the Secretary's discretion is at its zenith. See *Marsh* v. *Oregon Natural Resources Council*, 490 U.S. 360, 377 (1989) (quoting *Kleppe* v. *Sierra Club*, 427 U.S. 390, 412 (1976)) ("[b]ecause analysis of the relevant documents 'requires a high level of technical expertise,' we must defer to the 'informed discretion of the responsible federal agencies'"). Even lower courts holding that judicial review of census determinations is not completely barred have uniformly acknowledged the "wide latitude" afforded the Census Bureau "to select its methods, techniques and by those

means to arrive at its own result." *Philadelphia* v. *Klutznick*, 503 F. Supp. 663, 677 (E.D. Pa. 1980).[12] Here, the Secretary and the Census Bureau acted well within the ambit of their discretion.

The district court was of the view that home of record data could "not provide a valid factual basis" for the apportionment of overseas employees. App. 77a. As the district court saw it, the Secretary's decision in July 1989 to incorporate overseas federal personnel in apportionment counts was based on the Defense Department's plans to conduct a census of its personnel abroad concurrently with the general decennial census; it correspondingly surmised that once the Defense Department withdrew its plans in December 1989, nothing but "inertial forces" drove appellants to use home of record data as a substitute for the Defense Department's cancelled survey. *Id.* at 75a-76a. Not so.

When the Defense Department dropped its plans to conduct a special enumeration, the Census Bureau considered alternative data sources that were available in existing records. After doing so, it concluded that home of record—which represents the State of the individual's permanent or actual residence at the time of enlistment—"comes closest to the concept of Usual Residence." A.R. 924. That judgment comported with the considered view of the House of Representatives, which passed a bill to mandate use of home of record data on the premise that "it most closely approximates the home State of individuals who are highly mobile, not by choice, but by virtue of their service to their country." H.R. Rep. No. 552, *supra*, at 3. By contrast, "[l]ast duty station merely reflects the location of the facility to which a person is as-

[12] See also *City of Camden* v. *Plotkin*, 466 F. Supp. 44, 53 (D.N.J. 1978) (the Census Bureau enjoys "broad discretion" in "determining the methods of enumeration"); accord *United States ex rel. City of Atlanta* v. *Steuart*, 47 F.2d 979, 982 (D.C. Cir. 1931); *Bethel Park*, 319 F. Supp. at 976; *Quon* v. *Stans*, 309 F. Supp. 604, 607 (N.D. Cal. 1970).

signed"—and to which he or she may retain no affinity after being transferred[13]—and would result in counting personnel in "states other than their actual previous U.S. residence." A.R. 925, 921.

The Census Bureau also satisfied itself that the data to be furnished by the Defense Department would be accurate, in light of the latter's representations that it would supplement its data and improve its methodologies. See page 10, *supra*. Moreover, although the district court made much of the Census Bureau's initial reliance on the Defense Department's proposed enumeration, which the court believed would have been preferable, that enumeration was designed to ascertain the person's last residence in the United States of six months or more in duration. A.R. 454, 497. Accordingly, like the "last duty station" method the Census Bureau rejected, it would not necessarily have resulted in an accurate measure of a person's permanent affinity for the State in question. But even if the district court might reasonably have concluded that the Defense Department's enumeration would have been "better" or "preferable" to the use of home of record data, that finding would not render the Census Bureau's approach arbitrary and capricious, or justify a court order mandating elimination of an entire component of the national population from the apportionment counts. Cf. *American Textile Mfrs. Institute, Inc.* v. *Donovan*, 452 U.S. 490, 527-528 (1981).

C. Even if the district court were correct in holding that the Secretary did not adequately explain his determination to include federal personnel stationed overseas in the state-by-state tabulation on the basis of their

[13] See A.R. 752 (remarks of Rep. Ridge during House subcommittee hearing on H.R. 2661, 101st Cong., 1st Sess. (1989), which would have required inclusion of overseas military personnel in apportionment counts) ("before I was shipped overseas I spent six months at Fort Benning, Georgia. I have not been since that time, at that time, or for the foreseeable future ever interested in being considered in any census as a resident of Fort Benning, Georgia. Northwestern Pennsylvania is my home.")

homes of record or comparable data, the relief ordered by the district court was wholly improper. As this Court recently explained, the options of a reviewing court in such circumstances are narrowly confined:

> If the record before the agency does not support the agency action, if the agency has not considered all the relevant factors, or if the reviewing court simply cannot evaluate the challenged action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation. The reviewing court is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry.

Florida Power & Light Co. v. *Lorion*, 470 U.S. 729, 744 (1985); accord *PBGC* v. *LTV Corp.*, 110 S. Ct. 2668, 2680 (1990); *Camp* v. *Pitts*, 411 U.S. 138, 142-143 (1973); *Overton Park*, 401 U.S. at 420. Adherence to that principle is especially necessary in the present context, because Congress has expressly conferred broad discretion and responsibility on the Secretary of Commerce to conduct the census, which necessarily includes authority to reevaluate data and methodologies when possible defects are brought to her attention. The district court improperly usurped that function by foreclosing any further consideration of including more than 922,000 persons in the apportionment counts.

Furthermore, even if the court could, under ordinary APA principles, order the *Secretary* to delete overseas federal personnel and their dependents from the apportionment counts, it had no authority to enter an injunction requiring the *President* to effect a new apportionment of the House of Representatives by transmitting a statement to Congress pursuant to 2 U.S.C. 2a. As we have explained, the President is not even subject to suit under the APA. In any event, the APA does not override established principles governing the denial of equitable relief. 5 U.S.C. 702. Here, the injunction results in an extraordinary intrusion into matters committed by the Constitution and laws to the political Branches; it also effects an extraordinary disruption of the redistricting process in the States that the expedited schedule in 2 U.S.C. 2a was designed to facilitate. The judgment of the district court therefore warrants review by this Court.

CONCLUSION

The Court should note probable jurisdiction and reverse the judgment of the district court.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

JOHN G. ROBERTS, JR.
Deputy Solicitor General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

MICHAEL JAY SINGER
MARK B. STERN
LORI M. BERANEK
Attorneys

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In the Supreme Court of the United States

OCTOBER TERM, 1991

BARBARA FRANKLIN, SECRETARY OF COMMERCE, ET AL.,
APPELLANTS

v.

COMMONWEALTH OF MASSACHUSETTS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

APPENDIX TO JURISDICTIONAL STATEMENT

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

JOHN G. ROBERTS, JR.
Deputy Solicitor General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

MICHAEL JAY SINGER
MARK B. STERN
LORI M. BERANEK
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

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APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 91-11234-WD

COMMOWEALTH OF MASSACHUSETTS, EDWARD F. BERLIN AND KAREN J. KEPLER, PLAINTIFFS,

v.

ROBERT MOSBACHER, AS SECRETARY OF THE UNITED STATES DEPARTMENT OF COMMERCE; MICHAEL DARBY, AS UNDERSECRETARY OF ECONOMIC AFFAIRS OF THE UNITED STATES DEPARTMENT OF COMMERCE; THE BUREAU OF THE CENSUS; BARBARA BRYANT, AS DIRECTOR OF THE BUREAU OF THE CENSUS; GEORGE HERBERT WALKER BUSH, AS PRESIDENT OF THE UNITED STATES; AND DONNALD K. ANDERSON, AS CLERK OF THE UNITED STATES HOUSE OF REPRESENTATIVES, DEFENDANTS.

Bownes, *Senior Circuit Judge*
Boyle, *District Judge*
Woodlock, *District Judge*

February 20, 1992

WOODLOCK, District Judge

The Commonwealth of Massachusetts and two of its registered voters bring this action challenging the manner by which the Congress of the United States

has apportioned the 435 seats in the United States House of Representatives. The plaintiffs contend 1) that the method for allocating House seats among the 50 states violated the constitutionally grounded principle of "one person, one vote" (the "apportionment claim"); and 2) that the method used in the 1990 census for counting federal employees serving overseas was improper (the "overseas census claims").

The plaintiffs seek declaratory relief and an injunction directing the defendants—the executive and legislative officers variously charged with overseeing the conduct of the census, the methodology for the allocation of congressional seats, and the certification of the allocation [1]—to reallocate the seats apportioned

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[1] Under 13 U.S.C. § 141, the defendant Robert Mosbacher, as Secretary of the United States Department of Commerce, was charged with the task of conducting the 1990 Census and reporting the "total population by States." The Secretary is responsible for the administration of the Commerce Department; the defendant Michael Darby, the Commerce Department's Undersecretary for Economic Affairs, is responsible for overseeing the Bureau of the Census; and the defendant Barbara Bryant is the Director of the Bureau of the Census.

Under 2 U.S.C. § 2a(a), the defendant President Bush was charged with the task of transmitting to Congress a statement of the whole number of persons in each state as ascertained under the Census together with a statement of the number of members of the House of Representatives to which each state is entitled. This he did on January 3, 1991.

Under 2 U.S.C. § 2a(b), the defendant Donnald K. Anderson, as Clerk of the United States House of Representatives, was obligated to send the executive of each state a certificate setting forth the number of Representatives to which that state is entitled based on the President's statement. The defendant Anderson did so on January 16, 1991.

The defendants other than Anderson, styling themselves the "Executive Branch Defendants," have conducted the defense in this litigation. Anderson has stipulated that he will be bound by the judgment entered. The defendants as a group will be referred to in this opinion collectively as the "defendants," without differentiation as to their respective executive or legislative offices.

to the several states as a consequence of the 1990 census.

The animating concern which prompted this litigation was the loss by Massachusetts of one of its current eleven congressional seats as a result of the congressional reapportionment process necessitated by the 1990 census. The parties have stipulated (A) that if the plaintiffs prevail on their apportionment claim, Massachusetts will continue to have eleven seats in the House of Representatives while the State of Oklahoma will lose one of the six seats it has been allocated under the challenged apportionment methodolgy; or, alternatively, (B) that if the plaintiffs prevail on their overseas census claims, Massachusetts will continue to have eleven seats in the House of Representatives while the State of Washington will lose one of the nine seats it has received under the challenged census methodology. At issue is not merely the size of the Massachusetts delegation in the House of Representatives, but also the relative strength of the Massachusetts voice in the selection of the president through the electoral college, where a state's share of the 535 electors is "equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress." U.S. Const., art. II, § 1, cl. 2.

The case has been presented to us by cross motions for summary judgment, supported by a stipulation of facts and affidavits. The parties agree that there is

no genuine issue of material fact in dispute. While we conclude that the congressional judgment regarding the allocation of congressional seats was not violative of the Constitution and therefore reject plaintiffs' apportionment claim on the merits, we also conclude that the administrative judgment regarding the method of counting overseas personnel in the 1990 census was arbitrary and capricious, and an abuse of discretion in violation of the Administrative Procedure Act. Consequently, conditioned upon timely action by the defendant Commonwealth of Massachusetts, we will order the defendants to recertify state entitlements to seats in the House of Representatives.

In order to reach the merits of the case we have had to pass through a jurisdictional and justiciabilty thicket. Part of this thicket came with the territory, which required us to explore the breadth of the jurisdiction conferred by the three-judge court statute. The other part was cultivated by the defendants and the State of Washington as *amicus curiae*, who variously raised standing, the indispensability of absent parties, and the political question doctrine as justiciability impediments to plaintiffs' claims. Our passage through the several parts of the thicket helps to stake out the merits of the claims at the substantive heartland of the case. Accordingly, we turn first to a report of our passage before discussing the merits of the claims.

I.

THE JURISDICTION AND JUSTICIABILITY THICKET

A. The Jurisdiction of the Three-Judge Court

Congress has mandated that "[a] district court of three judges shall be convened . . . when an action is filed challenging the constitutionality of the apportionment of congressional districts." 28 U.S.C. § 2284 (a). Section 2284(b)(1) calls for the convening of the three-judge court "[u]pon the filing of a request for three judges." None of the parties, however, initially filed a request for the convening of a three judge court in this action.

Upon prompting by the single judge to whom this case was initially assigned and after a ruling by the United States District Court for the District of Montana before which a similar challenge to the congressional method of apportioning congressional districts among the states was mounted, *Montana v. United States Dep't of Commerce*, No. Civil Action CV-91-22-H-CCL, slip op at 4-5 (D. Mont. Aug. 15, 1991) (decision of single judge denying motion to dissolve three-judge court), 775 F. Supp. 1358, 1360 (D. Mont., 1991) (three-judge court opinion on merits affirming, *inter alia*, decision to convene three-judge court) *prob. juris. noted*, 60 U.S.L.W. 3435 (U.S. Dec. 16, 1991) (No. 91-860), the plaintiffs requested that a three-judge court be convened at least as to the apportionment claim. Plaintiffs also maintained at that time that the overseas census claims merited adjudication by a three-judge court. The defendants opposed the request. This three-judge court was con-

vened without prejudice to the right to move to dissolve it. The defendants made such a motion.

At oral argument, the defendants, recognizing that the Solicitor General had recently conceded in his submissions to the Supreme Court the propriety of the three-judge district court in the *Montana* litigation, Jurisdictional Statement, *United States Dep't of Commerce v. Montana*, U.S. No. 91-860, at 25-28, abandoned their motion to dissolve this three-judge court as to the apportionment claim. The defendants, however, maintained that three-judge court consideration of the overseas census claims standing alone was inappropriate. The plaintiffs, while continuing their request for three-judge court treatment of the apportionment claim, expressed themselves at oral argument as indifferent on the question whether a three-judge court should dispose of the overseas census claims.

Because we believe the question of the propriety of a three-judge court cannot be left to the variable dispositions of the parties but rather is a jurisdictional issue always open to review,[2] we have undertaken our own independent analysis of the question.

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[2] We recognize that commentators have suggested the right to a three-judge court is waivable and that, in the absence of a request for a three-judge court by the parties, there is no obligation to convene one. 17 Wright, Miller & Cooper, *Federal Practice and Procedure* § 4235, at 610-12 (1988); Williams, *The New Three-Judge Courts of Reapportionment and Continuing Problems of Three Judge-Court Procedure*, 65 Geo. L.J. 971, 975 & n. 14 (1977). This suggestion carries with it the correlative proposition that the propriety of a three-judge court is not a jurisdictional matter. As attractive as is the proposition that the complexities of the law of three-judge district courts can be ignored if the parties do not raise the issue, we can find nothing in the statute or the case law governing such courts that would support it. The commentators' views appear to be a hopeful assertion that courts by imaginative interpretation should be able to find a way to adopt a better policy. *See, e.g.*, 17 Wright, Miller & Cooper, § 4235 at 611 ("there is now new statutory language with enough inconsistency in it to justify" new interpretation that three-judge court is not jurisdictional); Williams, *supra*, at 975 n. 14 ("Two old Supreme Court cases preclude waivability of section 2284. They should be overruled.") We are not as free as the commentators to enact our policy preferences.

1. *The Apportionment Claim*

In their initial opposition to the convening of a three-judge court, even as to the apportionment claim, the defendants relied upon a distinction they perceived between intrastate and interstate apportionment disputes. Noting that until the *Montana* decision, all litigated challenges to the constitutionality of the apportionment of congressional districts had been directed at the decisions of state legislatures in the apportioning of districts within particular states, the defendants contended that interstate apportionment of districts could not have been within the contemplation of Congress when it revised the three-judge district court provisions in 1976.

The distinction drawn by the defendants makes no material difference under § 2284. It is well recognized that the three-judge court procedure imposes heavy logistical demands on the federal judiciary. But the burden has been perceived necessary as a means for "saving of state and federal statues from improvident doom at the hands of a single judge." *MTM, Inc. v. Baxley*, 420 U.S. 799, 804 (1975) (per curiam). In no area is that concern more critical to the legitimacy of judicial decisionmaking than in the politically charged context of legislative reapportionment. And Congress made a deliberate decision to

continue the application of three-judge court procedures to reapportionment cases when it narrowed the jurisdiction of those courts in 1976.

The provisions for district courts sitting as a panel of three judges, one of whom must be a judge of the court of appeals—together with the opportunity for direct appeal to the Supreme Court—are useful in diminishing any perception that parochialism or partisanship will dominate decisions about the constitutionality of reapportionment. As the Senate Report supporting the narrowing of the three-judge court jurisdiction recognized, reapportionment matters "are of such importance that they ought to be heard by a three-judge court." S.Rep. No. 204, 94th Cong., 1st Sess. 3 (1975) *reprinted in* 1976 U.S.C.C.A.N. 1988, 1996. That importance is not affected by whether it is a state or the federal legislature which has made the reapportionment decision under review.

The language of the three-judge court statute makes no distinction between federal or state action regarding apportionment, and the relevant legislative history indicates Congress had no such distinction in mind. The Senate Report characterized the purpose of the amendments to three-judge court jurisdiction as an effort to "eliminate[] the requirement for three-judge courts in cases seeking to enjoin the enforcement of State or *Federal* laws on the grounds that they are unconstitutional, *except in reapportionment cases.*" *Id.* at 1-2 (emphasis supplied). Similarly, the House Report observed that the legislation would "*continue* the requirement for a three-judge court in cases challenging the constitutionality of *any* statute apportioning congressional districts." H.R. Rep. No. 1379, 94th Cong., 2d Sess. 6 (1976) (emphasis supplied).

In short, we are satisfied that the plaintiffs' apportionment claim is a matter which Congress, through § 2284(a), has directed must be determined by a three-judge court.

2. *The Overseas Census Claims*

The plaintiffs' overseas census claims present a different set of circumstances. We recognize that one of the plaintiffs' census claims challenges the constitutionality of the manner by which the Secretary of Commerce chose to allocate overseas federal employees to individual states. That allegedly unconstitutional allocation, in turn, has become a basis upon which the Congress apportioned congressional seats among the states. It is unclear, however, whether the jurisdictional statute was intended to embrace this type of census claim as within the meaning of a challenge to the "constitutionality of the apportionment of congressional districts." 28 U.S.C. § 2284(a). The methods of the census counts are precursors to the ultimate apportionment decisions, and an attack on those methods does not necessarily amount to a direct challenge to apportionment itself.

As an historical matter, a number of similar census claims have been litigated before single district judges.[3] However, only one court seems to have ad-

[3] *See, e.g., City of New York v. United States Dep't of Commerce*, 739 F. Supp. 761 (E.D.N.Y. 1990); *City of Willacoochee v. Baldridge*, 556 F. Supp. 551 (S.D.Ga. 1983); *City of Philadelphia v. Klutznick*, 503 F. Supp. 663 (E.D.Pa. 1980); *West End Neighborhood Corp. v. Stans*, 312 F. Supp. 1066 (D.D.C. 1970). *But see Black Political Task Force v. Connolly*, 679 F. Supp. 109 (D.Mass. 1988) (three-judge court treating validity of state census methodology in context of challenge to state legislative reapportionment dispute without addressing jurisdictional issue).

dressed directly the scope of the jurisdictional grant in § 2284(a) in analogous circumstances. In *Federation for American Immigration Reform ("FAIR") v. Klutznick*, 486 F. Supp. 564 (D.D.C. 1980), *appeal dismissed*, 447 U.S. 916 (1980), a three-judge district court was convened to consider plaintiff's contention that the inclusion of illegal aliens in the 1980 census would be unconstitutional. While disposing of the case on other grounds, the *FAIR* court concluded that three-judge court jurisdiction was lacking for this indirect challenge to apportionment. *Id.* at 577-78.

The commentators, however, would construe the statute more broadly. Professors Wright, Miller and Cooper suggest that § 2284(a) "ought to include all federal constitutional challenges that could result in reapportionment." 17 Wright, Miller & Cooper § 4235 at 606. *See also* Williams, *The New Three-Judge Courts of Apportionment and Continuing Problems of Three-Judge Court Procedure*, 65 Geo.L.J. 971, 979 (1977). The parties have stipulated here that, if plaintiffs' constitutional overseas census claims are successful, a reapportionment would follow. But while the resulting reapportionment is a certainty in this case, it also looms as a possibility in virtually every census challenge. The construction given by the commentators to the scope of the "apportionment" language in § 2284(a) thus suggests that all census litigation is appropriate for three-judge court treatment. We very much doubt that was the congressional intent.

We need not determine the precise scope of § 2284(a) in this case, however, because, even if the statute does not provide for a direct exercise of three-judge court jurisdiction over the overseas census claims standing alone, concerns for the conservation of ju-

dicial resources and the avoidance of litigative entropy counsel for three-judge court treatement in this instance. Plaintiffs' overseas census claims do not stand alone but rather are coupled here to an apportioment claim plainly within the jurisdiction of this three-judge court. The direct apportionment claim and the overseas census claims concern the same general subject matter—the transformation of census apportionment counts into seats in the House of Representatives. They became ripe for decision at the same time and they were heard simultaneously by the three-judge panel. For orderly review, our contemporaneous judgments regarding them should be appealed to the same court at the same time.

While not directly governing the exercise of three-judge court jurisdiction, we believe that analogies to our exercise of three-judge court jurisdiction over the overseas census claims may be found in doctrines of supplemental jurisdiction applicable to district courts generally. The Supreme Court has recognized the power of a properly convened three-judge court to determine claims in the case that otherwise would be appropriate for a single district judge. *See, e.g., Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 504 n. 6 (1972); *Zemel v. Rusk*, 381 U.S. 1, 5-6 (1965); *Florida Lime & Avocado Growers, Inc. v. Jacobsen*, 362 U.S. 73, 85 (1960). The considerations are similar to those which govern the exercise of pendent jurisdiction when, as here, the claims "are such that [plaintiffs] would ordinarily be expected to try them all in one judicial proceeding," *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966), and all claims are within the Article III jurisdiction of the district courts.

While we recognize that in a strict sense the apportionment claim and the overseas census claims do not "derive from a common nucleaus of operative fact," *cf. United Mine Workers v. Gibbs*, 383 U.S. at 725, the values articulated in the jurisprudence of pendent jurisdiction are all present in this case. The " 'commonsense policy of pendent jurisdiction—the conservation of judicial energy and the avoidance of a multiplicity of litigation—' " *Newport Ltd. v. Sears Roebuck & Co.*, 941 F.2d 302, 308 n. 9 (5th Cir. 1991) (citation omitted) *reh. denied*, 946 F.2d 893 (5th Cir. 1991), *petition for cert. filed*, 60 U.S.L.W. 3482 (U.S. Dec. 23, 1991), applies equally here where time is of the essence as the nation prepares for the reapportionment of seats to be contested in the 1992 elections to the House of Representatives, and the parties have fully presented all aspects of the case at the same time to the three-judge court. Moreover, we see no benefit to be gained by atomizing avenues of appellate review. Any requirement that the overseas census claims be reviewed first in the Court of Appeals while the apportionment claim is available for direct appeal to the Supreme Court would only delay final resolution of the controversy by burdening yet another court without apparent meaningful value to ultimate consideration by the Supreme Court.

Our reliance on this "commonsense" and policy-bound approach is further fortified by Congress' decision in 1990 to codify the doctrines of pendent and ancillary jurisdiction in 28 U.S.C. § 1367.[4] The new

[4] Ancillary jurisdiction is an amorphous doctrine which permits a district court with proper jurisdiction over a given claim to resolve related matters over which the court could not assert an independent basis for jurisdiction. The Supreme Court has declined to decide whether there exists any substantive distinction between ancillary and pendent jurisdiction. *See* 13 Wright, Miller & Cooper, *Federal Practice and Procedure* § 3523 at 96 (1988). Other commentators suggest that pendent jurisdiction is merely a subset of ancillary jurisdiction. E. Chemerinsky, *Federal Jurisdiction* § 5.4.1 at 276 (1989). In any event, as noted, the new statute renders the distinction meaningless.

statute, which conflates the two theories into the unitary concept of "supplemental" jurisdiction, evidences congressional endorsement of jurisdictional rulings which subserve the efficient disposition of related claims. The statute provides that:

> in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

28 U.S.C. § 1367(a). Congress has thereby authorized supplemental jurisdiction "to the limits Article III of the Constitution permits." 13 Wright, Miller & Cooper, *Federal Practice and Procedure* § 3567.3 at 35 (1991 Supp.).

Section 1367 may be read to make the exercise of such jurisdiction virtually mandatory. Not only does the language of subsection (a) state that the district court "*shall* have" jurisdiction, subsection (c) strictly limits the circumstances in which a court may decline to exercise supplemental jurisdiction.[5] None of those

[5] Section 1367 reads:

(C) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—

(1) the claim raises a novel or complex issue of state law,

circumstances is applicable here. The same concerns for judicial economy and efficient resolution of disputes in a single forum counsel us to hear the overseas census claims in conjunction with the apportionment claim over which we have clear three-judge court jurisdiction.

Finally, because we are informed by the parties' stipulation of fact that the determination of the overseas census claims will translate directly into a specific transfer of a congressional seat from Washington to Massachusetts, we are of the view that the policy considerations which led Congress to preserve the jurisdiction of three-judge courts over challenges to the constitutionality of congressional reapportionment are by analogy applicable here. By the same token the burden of three-judge court business upon either the District Courts or the Supreme Court in the aftermath of the 1976 amendment to the three-judge court statute is not so substantial as to require a hypertechnical restriction on the practical exercise of a supplemental jurisdiction in this case.

Thus, we have considered and determined the plaintiffs' overseas census claims as a three-judge court. *But see FAIR*, 486 F. Supp. at 578 (outlining procedure by which single District Judge to whom case was assigned may separately certify same conclusion as that reached by the three juduge court).[6]

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(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction,

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

[6] Because the author of this opinion is the single district judge to whom this case was initially assigned, this opinion stands as certification that the author has individually arrived at the conclusions expressed collectively in the opinion and the judgment of this three-judge court.

B. Standing

The defendants' principal standing argument[7] is essentially a subtle shell game. The defendants note that if the plaintiffs prevail on the overseas census claims, the injury of which they complain—the loss of a congressional seat by Massachusetts—will have been remedied. Thus, the defendants maintain, the plaintiffs cannot complain of an injury caused by the asserted unconstitutionality of the apportionment method for allocating seats among the states chosen by the Congress.

The defendants' argument is erected upon a stilted reading of the case law which imposes the unexceptional requirement that in order to establish standing a party must demonstrate that its alleged injuries "'fairly can be traced to the challenged action.'" *See generally Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 74 (1978), (quoting *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41 (1976)). At bottom, this is a requirement that the relation between a plaintiff's injury and a defendant's action not be so attenuated as to raise a question whether judicial action to redress the injury would be merely advisory or gratuitous.

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[7] As a specific and subsidiary ground for their standing defense, the defendants contend that Commonwealth of Massachusetts cannot maintain this litigation in its own name. We reject this ground. The interest of the Commonwealth as a state—and the injury it sustains by a diminution in the strength of its Electoral College delegations—are evident in the text of the Constitution, which provides that "Each *State* shall appoint [its Electors], in such manner as the Legislature

We read this requirement as not dissimilar to the requirement of proximate cause in tort law. The mere fact that two independent causes may have contributed to an injury does not make one or the other any less a proximate cause. It is only when the various contributing causes are so diffuse and indeterminate that the requisite showing of causation is put in question. The District of Columbia Circuit has observed that:

> The weight of Supreme Court authority emphasizes that when numerous third parties and independent variables lead to an injury, the complainant has the burden of showing that but for the particular governmental action that he is challenging, the injury would abate. We have interpreted these cases to mean that petitioners "must show that the agency's action is more than only one of the many factors whose relative influence may affect the third parties' behavior."

Dellums v. United States Nuclear Regulatory Commission, 863 F.2d 968, 980 (D.C.Cir. 1988) (citations omitted), (quoting *Community for Creative Non-Violence v. Pierce*, 814 F.2d 663, 669 (D.C.Cir. 1987)).

Where, as here, the separate causes are distinct and determinate and their influence is direct, the requisites of standing have been demonstrated as to both causes.

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thereof may direct . . . ." U.S. Const. art. II, § 1, cl. 2 (emphasis supplied). As Chief Justice Fuller observed a century ago, "the appointment and mode of appointment of electors belong exclusively to the States under the Constitution of the United States." *McPherson v. Blacker*, 146 U.S. 1, 35 (1892). Consequently, we decline to follow *Ridge v. Verity*, 715 F. Supp. 1308, 1321 (W.D.Pa. 1989).

To be sure, considerations of judicial economy and the preference for resolving non-constitutional issues before reaching issues of constitutional dimension may counsel in favor of addressing one asserted independent cause rather than the other initially.[8] But that is not a standing impediment to the assertion of alternative claims for relief by a plaintiff. As an inferior court confronting two claims—both involving intense considerations of timeliness—which are positioned for direct review by the Supreme Court,[9] we have a special obligation not to resolve this litigation piecemeal or seriatim. Rather, we must undertake to dispose of both claims in order to permit an orderly, timely, and complete resolution of plaintiffs' claims. Defendants' spurious standing defense is no bar to that type of resolution by this court.

C. Indispensability of Absent Parties

The State of Washington, which was granted *amicus curiae* status early in this action, belatedly filed a

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[8] Indeed, although styled as a standing objection, an inconsistency in defendants' position suggests that they are simply seeking to have this court address the overseas census claims first before moving on, if necessary, to the apportionment claim. This is the only explanation for the defendants' decision to press the standing issue against the apportionment claim and not against the overseas census claims. A truly consistent—if, nevertheless, plainly untenable—position would be to contend that because both the apportionment and the overseas census claims established separate causes of redressable injury, there is standing to pursue neither. Such a foolish consistency would serve, of course, only to underscore the Catch-22 quality of the defendants' standing argument.

[9] We note that the Supreme Court has placed the *Montana* litigation on an expedited schedule, with argument set for the February sitting. *Montana v. United States Dep't of Commerce*, 60 U.S.L.W. 3435 (U.S. Dec. 16, 1991) (No. 91-860).

brief asserting that this case could not properly proceed because of its absence as an indispensable party. Washington, which, like all other states, was given notice of this litigation, observes that the parties have stipulated that if the plaintiffs' overseas census claims are sustained, Washington will lose the one seat in the House of Representatives that Massachusetts will gain. Washington, however, has affirmatively chosen not to participate in this litigation as a party. Rather it asserts that it will not waive its sovereign immunity rights, that it has commenced its own litigation in the Western District of Washington to seek a declaration of these matters, and that in any event, the Supreme Court of the United States is the only forum available for the resolution of what is essentially an interstate dispute.

We do not pause to consider whether Washington can be made a party to this proceeding; the present parties have not sought to bring her in and she has not sought to intervene. Those concerned with the defendants' decisions are free to bring appropriate actions as they see fit in those jurisdictions where venue is proper. We are satisfied, moreover, that the Supreme Court is not the sole forum for resolution of reapportionment suits against federal defendants, at least unless two states having adverse interests are indispenable parties to the action.[10] We turn, then,

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[10] We take no position whether the circumstances that adverse states may be indispensable parties to a reapportionment suit challenging the actions of federal defendants may itself be a sufficient condition for the invocation of the Supreme Court's original and exclusive jurisdiction for suits between states under 28 U.S.C. § 1251(a) or, for that matter, the nonexclusive jurisdiction for suits between states and the United States under 28 U.S.C. § 2151(b)(2). The Supreme Court has developed "occasionally restrictive rules of justiciability and high standards of legal and factual persuasion," 17 Wright, Miller & Cooper, *Federal Practice and Procedure* § 4045, at 194 (1988), to limit extensive deployment of its original jurisdiction. The Court has not yet been afforded the opportunity to consider whether its original jurisdiction must or should be exercised over a reapportionment suit.

to the question whether Washington is an indispensable party to this proceeding in this forum.

Washington stumbles at both hurdles to achieving indispensable party status. First, even assuming—as we will—that it is not feasible to join the State involuntarily because of her assertion of sovereign immunity, we cannot find her a necessary party under Fed. R. Civ. P. 19(a). *See generally Pujol v. Shearson/American Express, Inc.*, 877 F.2d 132 (1st Cir. 1989). The relief sought, proper recertification by the defendants of House of Representative seat entitlements for each state, will be complete even in Washington's absence. More importantly, the interests of Washington, derived from the favorable census decisions of the defendants, are being fully and vigorously protected by the defendants themselves. And those defendants are no more subject to substantial risks of inconsistent judgments than is the federal government generally at any time it takes action of widespread consequence open to litigation throughout the nation.

Moreover, even if Washington were to overcome the necessary party hurdle presented by Federal Rule of Civil Procedure 19(a), she is still unable to satisfy us that "in equity and good conscience" this action should be dismissed in her absence as a formal party under Rule 19(b). *See generally Travelers Indemnity Co. v. Dingwell*, 884 F.2d 629 (1st Cir. 1989). As a

practical matter we see no prejudice to Washington. As we have noted, the defendants are vigorously protecting her right to an additional House seat as a result of their actions. Her concerns have been voiced to us directly through her amicus status. The parties before us recognize that relief in her absence will be adequate. And the unpalatable alternative—given Washington's refusal to participate in this forum—would be to remit the parties to the uncertainties and delay of proceeding in another forum, whether the Supreme Court through its questionable original jurisdiction, *see supra* note 10, or the Western District of Washington where Massachusetts would have to do what Washington will not do here: submit to a jurisdiction she otherwise objects to.

We recognize that other courts have been sensitive to the need to protect the interests of all states in census litigation and to the dangers of distortion presented when only one state seeks a census adjustment. *See generally Carey v. Klutznick*, 653 F.2d 732 (2d Cir. 1981), *cert. denied*, 455 U.S. 999 (1982); *Tucker v. United States Dep't of Commerce*, 135 F.R.D. 175 (N.D.Ill. 1991), *appeal pending*, No. 91-2051 (7th Cir.). Unlike the procedures employed in those cases, all states here received notice of this litigation, and Washington actually presented her views directly to us. There was no impediment to the full and fair development of the facts as a result of Washington's absence. Furthermore, when, as here, the issues are narrowly framed and their resolution can be understood in terms of a single national policy automatically having an equal effect on all states, any residual potential for unfairness is minimized.

In short, we hold that the absence of the State of Washington—or any other state save Massachusetts—

as a formal party to this case is not grounds to pretermit this proceeding.

D. Political Question

In their briefing of this case, the defendants have invited us to employ what has quite accurately been termed the "amorphous and partly prudential doctrine of 'political questions,'" *Morgan v. United States*, 801 F.2d 445, 447 (D.C.Cir. 1986) (Scalia, J.), *cert. denied*, 480 U.S. 911 (1987), as a device to avoid evaluating their apportionment actions. By this device, the defendants seek to have us abstain from judicial evaluation of the merits of the congressional choice of method for allocating seats in the House of Representatives. It appears, however, that the defendants do not argue for wholesale application of the political question doctrine in this context. In their briefing to the Supreme Court for the parallel *Montana* litigation, the defendants carefully asserted that they

> do not suggest that *all* matters concerning the apportionment of Representatives among the States are necessarily nonjusticiable . . . But separation of powers principles—on which the political question doctrine rests—bar a court from setting aside Congress's selection of a particular method of apportionment that is not demonstrably contrary to . . . an explicit textual limitation on its discretion.

Brief for Appellants, *United States Dep't of Commerce v. Montana*, U.S. No. 91-860, at 34-35.

We are less than entirely comfortable in relying upon the political question doctrine as an avoidance technique in the context of a reapportionment dispute.

As a general proposition, we find considerable force in Professor Wechsler's view that:

> the only proper judgment that may lead to an abstention from decision is that the Constitution has committed the determination of the issue to another agency of government than the courts. Difficult as it may be to make that judgment wisely, whatever factors may be rightly weighed in situations where the answer is not clear, what is involved is in itself an act of constitutional interpretation, to be judged by standards that should govern the interpretive process generally.

Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 9 (1959). *See also* Henkin, *Is There a "Political Question" Doctrine?*, 85 Yale L.J. 597 (1976); *but see* Mulhern, *In Defense of the Political Question Doctrine*, 137 U.Pa.L. Rev. 97 (1988).

Nevertheless, the doctrine has been raised and not yet abandoned by the defendants as to the apportionment claim in this litigation. Moreover, "although the Supreme Court has rarely applied the doctrine in recent years, it has also declined the several opportunities available to dispatch it. We [must] honor the doctrine and apply it here." *Nixon v. United States*, 938 F.2d 239, 246 (D.C.Cir. 1991) (citations omitted), *reh. denied*, 1991 U.S.App. LEXIS 25391 (D.C. Cir. 1991), *petition for cert. filed*, 60 U.S.L.W. 3376 (U.S. Nov. 4, 1991) (No. 91-740).

The modern formulation of the political question doctrine is found in *Baker v. Carr*, 369 U.S. 186 (1962), where the Supreme Court held that a challenge presented to the apportionment of Tennessee's General Assembly did not involve a nonjusticiable political question. 369 U.S. at 209. Describing the

doctrine as essentially a function of the separation of powers, the Court outlined six factors which may be observed in cases raising political question considerations:

> Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.
>
> Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for nonjusticiability on the ground of a political question's presence. The doctrine of which we treat is one of "political questions," not one of "political cases." The courts cannot reject as "no law suit" a bona fide controversy as to whether some action denominated "political" exceeds constitutional authority. The cases we have reviewed show the necessity for discriminating inquiry into the precise facts and posture of the particular case, and the impossibility of resolution by any semantic cataloguing.

Id. at 217.

As our treatment of the merits in Section II of this opinion illustrates,[11] inquiry into "the precise facts and posture" of the apportionment controversy satisfies us that, whatever the scope of the political question doctrine, it is not applicable here.[12] None of the six factors identified in *Baker v. Carr* as relevant to the question whether the political question doctrine may render the apportionment claim nonjusticiable

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[11] We recognize in this connection the intellectual conundrum framed by Judge Edwards:

> If the political question doctrine is to have any integrity as a constraint upon judicial review, its invocation must arise from an analysis of the Constitution that stands apart from any conclusion of the merits of the particular claim presented.

Nixon v. United States, 938 F.2d 239, 257 (D.C.Cir. 1991) (Edwards, J., concurring in the judgment and dissenting in part), *reh. denied*, 1991 U.S. App. LEXIS 25391 (D.C.Cir. 1991), *petition for cert. filed* 60 U.S.L.W. 3376 (U.S. Nov. 4, 1991) (No. 91-740). Nevertheless, in order to address the political question doctrine in a particular case it is necessary to evaluate the merits of the claim presented. This necessity, of course, may be viewed as reflecting adversely upon the independent integrity of the political question doctrine as a constraint upon judicial review.

[12] The defendants have chosen in this litigation to raise the political question doctrine only as to the apportionment claim. Despite the recent observation of the *City of New York* court that the defendants "must be admired for their tenacity" in repeatedly—if unsuccessfully—resurrecting the political question issue in that census litigation, *City of New York* v. *United States Dep't of Commerce*, No. 88-CV3474, slip op. at 2 (E.D.N.Y. Sept. 19, 1992), and the defendants' success on the question in census litigation before another court, *Tucker v. United States Dep't of Commerce*, 135 F.R.D. 175 (N.D.Ill. 1991), *appeal pending*, No. 91-2051 (7th Cir.), the defendants have not chosen to raise the political question issue as to the overseas census claims before us.

is implicated in this case. Our extended inquiry has satisfied us that those factors, whether considered individually or together, are not a bar to our resolution of this dispute on the merits.

First, and most fundamentally, while it is clear that the language of the Constitution has been understood implicitly to make the principal Constitutional commitment on the issue of apportionment a matter for the Congress itself, there are other Constitutional directives regarding apportionment. Indeed, several different Constitutional provisions come into play. Some are explicit, for example, that the allocation of House seats to the states must be "according to their respective numbers." U.S. Const., art. I, § 2, cl. 3, *amended by* U.S. Const. amend. XIV, § 2. Other constitutional requirements are implicit, for example the reading given by *Wesberry v. Sanders*, 376 U.S. 1 (1964) to Article I, Section 2, Clause 1 resulting in application of the "one person, one vote" principle to congressional redistricting. Congress must exercise its power over apportionment within the constraints of all the constitutional provisions which explicitly and implicitly govern congressional discretion in this area. And it is the responsibility of the courts to determine "whether Congress has chosen a constitutionally permissible means of implementing that power." *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 940-41 (1983).

Second, the standards for resolving this issue are both judicially discoverable and judicially manageable. The implementation of the "one person, one vote" principle in the courts over the last 25 years has generated a substantial body of case law and judicial experience which can be brought to bear in making an evaluation of a congressional apportionment judgment.

We note in this regard that the Supreme Court has recently found the most politically complex of reapportionment disputes, political gerrymandering, to be justiciable against a political question defense. *See Davis v. Bandemer*, 478 U.S. 109, 124 (1986).

Third, judicial review does not involve a policy determination of a kind inappropriate for judicial discretion. The issue of apportionment is not beyond the scope of judicial discretion. Of course, the courts can and should avoid extra-constitutional policy making determinations in this area. But evaluation of consonance with the Constitution is the kind of task which is clearly meant for judicial determination. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) ("It is, emphatically, the province and duty of the judicial department, to say what the law is.").

Fourth, the rendition of judicial judgment in an apportionment case hardly constitutes an expression of lack of respect for Congress. The responsibilities of the judiciary under our structure of separated and balanced powers necessarily involve the "duty to review the constitutionality of Congressional enactments." *United States v. Munoz-Flores*, 110 S.Ct. 1964, 1968-69 (1990). There is no disrespect intended nor understood when the courts exercise their duty in this manner.

Fifth, there is no unusual need for an unquestioning adherence to the decision previously made by Congress. Unlike national security matters, this is not an area of special sensitivity. The methodology for apportionment has been adjusted at various times throughout the history of the nation. Judicial examination to determine the constitutionality of such adjustments disturbs no need for repose in a decision previously made by Congress.

Finally, we do not deal with the embarrassment of multifarious pronouncements by various departments on one question. To be sure, the defendants have sought to restyle this issue as raising the danger of different initial opinions from different inferior federal courts. That is a danger that arises whenever a congressional enactment of nation-wide impact is open to examination in various *nisi prius* venues. The ulitmate decision, however, will be that of the Supreme Court. And there will be no multiplicity of ultimate judgment in this area. There is, of course, the possibility that the ultimate judgment of the judicial department through the Supreme Court will be at odds with that of Congress. But, this is neither lack of respect for the Congress nor an embarrassment for the country. Rather, it reflects the bedrock determination that our system of government leaves to the judiciary the duty "to act as the ultimate interpreter of the Constitution." *Powell v. McCormack*, 395 U.S. 486, 549 (1969).

II

THE APPORTIONMENT CLAIM

> "Representatives shall be apportioned *among the Several States according to their respective numbers* . . ."
>
> U.S. Const. art. I, § 2, cl. 3, *amended by* U.S. Const. amend. XIV, § 2. (emphasis supplied)

Allocation of seats in the House of Representatives was at the heart of the bargain by which the several states agreed to enter into and remain a union. It was the issue central to successful drafting of the

Constitution in 1787 and it was necessarily the subject of textual revision in 1868 during the rearrangement of the federal-state relationship brought about by the constitutional amendments of the Reconstruction era. Throughout the more than two centuries of this nation's history, the Congress has been the ultimate custodian of power to implement the constitutional bargain reflected by the allocation of House seats. Indeed, it was not until the most recent reapportionment in 1991 that a challenge was mounted in the courts to the congressional stewardship of this responsibility. The merits of such a challenge must be addressed in light of the relevant constitutional text and its necessary implications, the historical treatment of the issue in Congress, and the development of the "one person, one vote" principle in the courts.

A. *The Relevant Constitutional Text and Its Implications*

Article I, Section 2, Clause 1 of the Constitution provides that "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States." Clause 3 of Article I, section 2 provides for the allocation of those representatives among the several states. These provisions were the product of the Great Compromise, through which the divergent interests of the states were accommodated by providing a Senate in which each state was to be equally represented by two Senators, and a House of Representatives in which the representatives were to be "apportioned among the several States which may be included within this Union according to their respective Numbers." Under clause 3, however, irrespective of their numbers, "each State shall have at Least one Representative."

As adopted, Article I, section 2, clause 3 embodied the "original sin" of the new American commonwealth by recognizing the peculiar institution of slavery through an indirect, almost invisible and, consequently, profoundly insidious reference. The "respective Numbers" of the states were required to "be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, *three fifths of all other Persons.*" (emphasis supplied). The treatment of slaves as three fifths of other persons was another aspect of the Great Compromise in which the slave and non-slave holding states fashioned an accommodation regarding the relative advantages and disadvantages which would accrue to the states from the counting of slaves in a state's population.

The textual revolution in the Constitution following the Civil War was directed in part to the treatment of the former slave populations in Article I, Section 2, Clause 3. Section 2 of the Fourteenth Amendment repudiated the fractionation of persons. Instead the amendment provided: "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed." As with all of the Fourteenth Amendment—including the equal protection clause of § 1—Congress was given express enforcement powers over § 2 by § 5 of the amendment, which provided that "[t]he Congress shall have power to enforce by appropriate legislation, the provisions of this article."

Although not express in clause 3 of Article I, section 2, two principles have been accepted without dispute as implicit in the text, the circumstances of its adoption and the structure of the Constitution. The first was that Congress itself would be responsible for

the apportionment of the House of Representatives. As Justice Story observed: "the power to apportion representatives, after . . . enumeration is made, is nowhere found among the express powers given to congress, but it has always been acted upon, as irresistibly flowing from the duty positively enjoined by the constitution." *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 619 (1842). The second was that congressional districts were to be assigned by state and no congressional district would be drawn with constituents from more than one state.

The mathematics of apportioning representatives subjects the process to an irreducible condition. The division of any national population figure by the number of house seats to be apportioned, which is necessary for an allocation of representatives among the states, will, as a practical matter, invariably result in each state being allocated a whole number of representatives with a fraction left over. How to deal with the fractional remainder has been the historic challenge of the apportionment process as administered by Congress during the past two centuries.

B. Historical Development [13]

Not surprisingly, given the centrality of the apportionment issue to the bargain for a union, the method of apportionment has been contested vigorously throughout the nation's history. Indeed, the

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[13] The history presented in this section is drawn from the Stipulation of Facts filed by the parties, from the initial affidavits of the parties' respective experts, Dr. H. Peyton Young (for plaintiffs) and Dr. Lawrence R. Ernst (for defendants), and from a book coauthored by Dr. Young: M. L. Balinski & H. P. Young, *Fair Representation—Meeting The Ideal of One Man, One Vote* (1982).

method chosen by Congress after the first census in 1790 was the subject of the first presidential veto. President Washington, aware that the method championed by his Secretary of Treasury, Alexander Hamilton, and passed by the Congress was perceived to favor northern states at the expense of southern States, vetoed the measure after reference to two grounds which have shaped the discussion of congressional apportionment methodology ever since. The veto message expressed reservations first, about the lack of a clearly defined divisor or number of house seats to be apportioned and second, about the failure to delineate the number of persons each Representative would represent.

The choice of divisor and the correlative delineation of the number of persons each representative would represent became the defining features for apportionments thereafter. Since the first census in 1790 Congress has employed four methods for apportionment. What has distinguished each has been the manner of disposing of the fractional remainders after a divisor is employed.

In response to President Washington's veto Congress adopted the Jefferson method—or "method of greatest divisors"—for the apportionments which followed the censuses of 1790 through 1830. Under the method of greatest divisors, the population of each state was divided by an identified number of persons per representative. The resulting whole number would be the size of the state's congressional delegation and the fractional remainder would be disregarded. Thus, if the division yielded a result of 4.9, the state would still be entitled only to a congressional delegation of 4, just as would a state for which division yielded a result of 4.2. The precise result of the

division, consisting of the whole number and the fractional remainder, is known as the state's House seat "quota."

By continually increasing the size of the House of Representatives, certain regional tensions created by the greatest divisors (Jefferson) method were suppressed because no state had to confront a contracting number of representatives in its congressional delegation. Nevertheless, over time, the greatest divisors (Jefferson) method was seen to have a tendency to favor the larger states and following the 1830 census apportionment a number of other alternative methods were developed by New Englanders, a region perceived to have been disadvantaged by the greatest divisors (Jefferson) method. Former President John Quincy Adams, then sitting in the House of Representatives as a member of Congress from Massachusetts, proposed a method which was the mirror image of the greatest divisors (Jefferson) method. Under the smallest divisors (Adams) method, each state would receive an additional House seat for any fractional remainder no matter how small. Thus, if the division of each state's population by the identified number of persons per representative yielded a result of 4.2, the state would be entitled to a congressional delegation of 5, just as would a state for which division yielded a result of 4.9.

Meanwhile, a University of Vermont professor of mathematics and astronomy, James Dean, proposed a more complex method—the "method of harmonic means"—under which a divisor would be chosen so that the whole numbers generated would create average constituencies for the congressional delegations of each state most closely approximating the divisor.

The harmonic means of two numbers is their product divided by their average. The harmonic means (Dean) method can result in certain quotients being rounded up irrespective of whether the fractional division gave the state less than half or more than half an additional congressional seat.

Neither the smallest divisors (Adams) method nor the harmonic means (Dean) method—both of which Montana has pressed in its litigation over the 1990 census apportionment—was ever adopted by Congress. However, yet another method—the "method of major fractions" devised by Senator Daniel Webster of Massachusetts—was adopted for the 1842 apportionment following the 1840 census. Under the major fractions (Webster) method, the fractional remainders after division of the state population by the chosen divisor would be allocated by providing one additional representative for each state having a fraction greater than one half.

The Congress departed from the major fractions (Webster) method with the 1850 census reapportionment. A third method, the "method of greatest fractions" advanced by Ohio Congressman Samuel F. Vinton involving a variation on the Hamilton method which President Washington had vetoed in 1792, was employed by the Congress initially in 1852. The greatest fractions (Vinton) method allocated additional Representatives to states having the largest fractional remainders after the whole numbers yielded by division were accounted for. The greatest fractions (Vinton) method had a disturbing paradox, however. Under certain circumstances, a state could receive fewer seats after the number of seats in the House was increased than it would have received if the seat number remained constant. This anomaly was presented most dramatically in the aftermath of the 1880

census when it was discovered that under the greatest fractions (Vinton) method, Alabama would receive eight seats if the House size was 299 but only seven seats if the House size were increased to 300.

Congress used the greatest fractions (Vinton) method in 1862 and 1972 but avoided the paradox by allocating additional representatives beyond those generated through strict use of that method. Because of its concern over the need to adjust the greatest fractions (Vinton) method to avoid the population paradox, Congress began to use the major fractions (Webster) method as a cross check. In the apportionments following the 1880, 1890, and 1900 censuses, the House size was set to insure that no state would lose any House seat and would receive an additional seat for any major fractional remainder. This effort proved especially demanding with the 1900 census when Congress was forced to experiment with projected House sizes ranging from 350 to 400 seats in order to understand the impact of apportionment on the projected congressional delegations, especially those of Maine and Colorado. The experiments revealed partisan and ideological fissures within the Congress as various groups sought to reinforce their voting strengths through the apportionment process.

Congress returned to the major fractions (Webster) method in 1911 when it finally fixed House membership at 435 seats.[14] Having fixed the available seats

[14] The 1911 apportionment legislation actually fixed House membership at 433 seats but it also provided that the Territories of Arizona and New Mexico would be entitled to one House seat each if they became states before the next census. Arizona and New Mexico became states in 1912 and the House size has remained 435 seats ever since except for a temporary increase of two seats to 437 in 1959 when Alaska

for apportionment, however, the Congress created the conditions for an impasse in which there would be no safety valve of manipulating the number of House seats to reach an accommodation. Henceforth the states would be contesting rights in a limited pool of House seats. The impasse was confronted during the next reapportionment cycle.

In the reapportionment efforts following the 1920 census, increased industrialization and the mechanization of agriculture accelerated in a war economy caused dramatic demographic changes. The substantial migration from rural to urban areas appeared likely to lead to a loss of House seats by as many as ten states. The time-honored expedient of mitigating relative loss by increasing the size of the House failed, however, when a bill to increase the House size to 483 seats was rejected. Despite repeated but unsuccessful efforts by Congress to meet its constitutional mandate to reapportion after every census, the decade of the 1920's passed with the 1911 apportionment continuing as the basis for allocating seats to the House of Representatives.

During the 1920's a sixth method of apportionment was fully articulated by Professor Edward V. Huntington of Harvard University, refining the work of Joseph A. Hill, a senior statistician at the Bureau of the Census. The method—which came to be known as the equal proportions (Huntington-Hill) method—sought to measure the disparities between state congressional delegations in relative terms. Thus, under the Huntington-Hill method, after the divisor provided by the size of the House was chosen, each state was assigned a number of seats so that no transfer of

and Hawaii became states. In the reapportionment following the 1960 census the House size reverted to 435 seats.

any one seat could reduce the percentage difference in representation between the states.

In an effort to break the impasse evidenced by the failure to effect a reapportionment following the 1920 census, House Speaker Nicholas Longworth asked the National Academy of Sciences (NAS) to evaluate the various known methods of apportionment. A panel of respected mathematicians chosen for the task reviewed five of the six methods which had evolved for dealing with the problem.[15] Four measures of equity can be found in the panel's analysis:

1) *Persons per representative* (average district size)—the state's population divided by its number of representatives.

2) *Each person's share of a representative*—the number of a state's representatives divided by its population.

3) *Representation surplus*—the difference between (i) the number of representatives of an over-represented state, and (ii) the number of representatives of an under-represented state multiplied by the population of the over-represented state divided by the population of the under-represented state.

4) *Representation deficiency*—the difference between (i) the number of representatives of an under-represented state, and (ii) the number of representatives of an over-represented state multiplied by the population of the under-represented state divided by the population of the over-represented state.

Measured in absolute terms in comparisons between any two states, four of the five methods were vari-

[15] The panel did not consider the greatest fractions (Vinton) method because the population paradox it could create was considered unacceptable.

ously found to achieve most successfully one of these measures of equity. The harmonic means (Dean) method was most successful in reducing the absolute difference between the number of persons per representative. The major fractions (Webster) method was most successful in reducing the absolute difference between each person's share of a representative. The smallest divisors (Adams) method was most successful in reducing the absolute representation surplus, and the greatest divisors (Jefferson) method was most successful in reducing the absolute representation deficiency.

When measured in relative terms, however, the equal proportions (Huntington-Hill) method was most successful in reducing the variation in both the number of persons per representative and in each person's share of a representative. Moreover, the NAS panel concluded that the equal proportions (Huntington-Hill) method among the five methods "occupie[d] mathematically a neutral position with respect to emphasis on larger and smaller states." Accordingly, the NAS committee recommended adoption of the equal proportions (Huntington-Hill) method for congressional apportionment.

After receipt of the NAS Report in 1929, the Congress passed an apportionment statute which provided that if no new apportionment method were agreed upon, the method of the last apportionment would be used. The 1929 apportionment statute was designed not merely to provide the previous method of apportionment as a default method in the absence of affirmative congressional action, it also required the President to transmit apportionment calculations based on the new census in light of both the major fractions (Webster) method and the equal propor-

tions (Huntington-Hill) method. The reapportionment following the 1930 census proceeded relatively smoothly because both the major fractions (Webster) method and the equal proportions (Huntington-Hill) method led to the same allocations. Although Congress formally utilized the major fractions, it also in fact employed the equal proportions (Huntington-Hill) method at the same time.

The apportionment following the 1940 census brought matters to a head again, however, because the allocations produced by the two methods were the same except for two states. Under the equal proportions (Huntington-Hill) method, Arkansas, which was a predominantly Democratic state, would be entitled to seven Representatives and Michigan, which was a predominantly Republican state, to seventeen; under the major fractions (Webster) method, Arkansas would be entitled to six Representatives and Michigan to eighteen. In a straight partisan and parochial House vote, "[e]very Democrat, except those from Michigan voted [to establish the equal proportions (Huntington-Hill) method as the permanent method for calculating reapportionment allocations], and every Republican voted against." Balinski & Young, *supra* note 13, at 58. Ultimately, after further congressional consideration, the equal proportions (Huntington-Hill) method was signed into law as the permanent method for reapportionment.

Congress has periodically initiated reexamination of the method of reapportionment since 1941. For example, in 1948 Congress requested from the NAS a report on "developments in the mathematical aspects of the apportionment problem as it affects the Con-

gress of the United States . . . ." [16] Three nationally prominent mathematicians re-examined the 1929 NAS study as well as other studies subsequently produced by others. In their 1948 report, the NAS mathematicians reaffirmed the NAS's 1929 findings, stating that the equal proportions (Huntington-Hill) method was the best method for "minimizing the [percent] discrepancy in the state-averaged district populations and the individual's share in a representative," and that this method stood in a middle position (i.e., a mathematically neutral position) as compared to the other methods examined.[17]

In 1971 the Subcommittee on Census and Statistics of the House Committee on Post Office and Civil Service produced a report which described the methodology and procedures which are used to apportion representatives among the several states.[18] Although this report examined the historical developments which led to adoption of the equal proportions (Huntington-Hill) method, it contained no recommendation for changing that apportionment method.

In 1981 the Subcommittee on Census and Population of the House Committee on Post Office and Civil Service held a hearing on H.R. 1990, a bill which would have required revisions in the format and timing of certain decennial census reports issued by the Bureau of the Census. However, at the outset of the hearing, the Subcommittee Chairman noted that "the question of the adequacy of the apportionment formula known as the equal proportions method enacted

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[16] *See* M. Morse, J. von Neumann & L. P. Eisenhart, "Report to the President of the National Academy of Sciences," May 28, 1948 at 1 (mimeograph).

[17] *Id.* at 6-7.

[18] H.R. Rep. No. 1314, 91st Cong., 2d Sess. 1 (1971).

by Congress in 1941, overshadows any consideration of . . . minor technical changes in census procedures." He went on to observe that "considerable technological advancements and methodological refinements" had occurred since the enactment of the equal proportions (Huntington-Hill) method, which had "potentially render[ed] equal proportion a less than precise method of satisfying the court imposed standards of equal representation." [19]

Following the 1981 hearing, no legislation was enacted to modify the authorized method for calculating the allocation of House seats. The equal proportions (Huntington-Hill) method, codified at 2 U.S.C. § 2(a), has thus remained—despite repeated congressional reexaminations—the authorized method for calculating the allocation of House seats; it was the method used to apportion congressional seats following the 1990 census.

Pursuant to the directions of § 2(a), a calculation of the House apportionment according to the equal proportions (Huntington-Hill) method based upon the 1990 census was prepared by the defendant officials of the Bureau of the Census and Department of Commerce and delivered to the President, who in turn transmitted this calculation to the Congress. The defendant Anderson, as Clerk of the United States House of Representatives, thereupon transmitted to the governors of the several states a certificate identifying the number of representatives to which that Governor's state would be entitled. The certificate received by the Governor of Massachusetts

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[19] *See Census Activities and the Decennial Census: Hearings on H.R. 1990 Before the Subcommittee on Census and Population of the House Committee on Post Office and Civil Service*, 97th Cong., 1st Sess. 1-2 (1981) (statement of Rep. Robert Garcia).

states that Massachusetts will be entitled to ten representatives, a loss of one member in its current congressional delegation.

We have rehearsed the history of congressional efforts to address the reapportionment question at some length to illustrate the extent of considered congressional involvement in the issue. The Constitutional command of decennial reapportionment coupled with the Congress's own institutional concerns has resulted in continuous, thoughtful, extensive and intensive examination of the problem by Congress throughout the past two centuries. While parochial and partisan interests have no doubt played their part in those deliberations—as they do in all legislation—it is apparent that Congress has carefully addressed itself to finding a method which implements the basic principle of assuring as nearly as practicable equal representation in the House of Representatives for equal numbers of people.

The question of practicability has, of course, been hotly debated, but the congressional resolutions of the issue throughout the nation's history have underscored the very practical measure of success enunciated by Justice Story in his Commentaries on the Constitution:

> [T]he truest rule seems to be, that the apportionment ought to be the nearest approximation to the terms of the constitution; and the rule ought to be such, that it shall always work the same way in regard to all the states, and be as little open to cavil, or controversy or abuse as possible.

J. Story, *Commentaries on the Constitution* § 676 (1833).

C. Judicial Standards

The Supreme Court, after avoiding what had been perceived as the inhospitable "political thicket" of reapportionment disputes, *Colegrove v. Green*, 328 U.S. 549, 556 (1946) (Frankfurter, J.); *see generally* Lewis, *Legislative Apportionment and the Federal Courts*, 71 Harv. L. Rev. 1057 (1958), grasped the nettle in the 1960s and began developing a jurisprudence of reapportionment.

1. *State apportionment of federal congressional districts*

Relying on the requirement in Clause 1 of Article I, Section 2 that the members of the House be "chosen by the People of the several States," the Court, speaking through Justice Black in *Wesberry v. Sanders*, 376 U.S. 1 (1964), concluded that state legislatures were obligated to eliminate population disparities among their legislative districts in service of the principle that "as nearly as is practicable one [person's] vote in a congressional election is to be worth as much as another's." *Id.* at 8. The *Wesberry* court stated that "our Constitution's plain objective" is "making equal representation for equal numbers of people the fundamental goal for the House of Representatives." *Id.* at 18.

Whatever the historical validity of the Court's decision to locate the otherwise unexpressed "one person, one vote" principle in Article I, Section 2, Clause 1, *see generally* Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 S. Ct. Rev. 119, 134-37, the subsequent course of Supreme Court review of congressional districting by the states has been straightforward and mathematically demanding. In *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969), the Court

held that a state "must justify each variance [of its congressional districts from the mathematical ideal], no matter how small." *Id.* at 531. This strict requirement was reaffirmed in *White v. Weiser*, 412 U.S. 783 (1973), and applied with great rigor in *Karcher v. Daggett*, 462 U.S. 725 (1983), where the Court held that when it is shown that population disparities among state-created congressional districts can be avoided, "the State must bear the burden of proving that each significant variance between districts was necessary to achieve some legitimate goal." *Id.* at 731.

Although potential justifications for avoidable population disparities are listed in *Karcher*, 462 U.S. at 740, the rigidity of the mathematics used in the Court's evaluation of congressional districting by states and the repeated refusal of the Court to find that any justification has been established both suggest that Justice Fortas was accurate when he ruefully reflected in *Kirkpatrick v. Preisler* on the single-mindedness with which the Court was prepared to reject "every justification that has been—possibly, every one that could be—advanced." 394 U.S. at 537 (Fortas, J. concurring). Perhaps the most accurate statement of the law of state congressional apportionment is found in an observation by then Justice Rehnquist for the Court in a state legislative redistricting case: "population alone has been the sole criterion of constitutionality in congressional redistricting under Art. I, § 2 . . ." *Mahan v. Howell*, 410 U.S. 315, 322 (1973). Given the present state of the law it is unlikely that any reapportionment plan established by a state for its congressional districts, however *de minimis* its disparities, will be upheld if another plan could be drafted which shows even more modest disparities.

2. *State apportionment of state legislative districts—*

In contradistinction to judicial evaluation of federal congressional apportionment by the states, which proceeds under Article I, Section 2, Clause 1, judicial review of state apportionment of state legislative districts has its roots in the equal protection clause of the fourteenth amendment.[20] *Reynolds v. Sims*, 377 U.S. 533 (1964) stated the requirement broadly by holding "that a State [must] make an honest and good faith effort to construct districts . . . as nearly of equal population as is practicable." *Id.* at 577. In implementing this requirement, the Supreme Court has articulated a somewhat more deferential approach to mathematical disparities found in apportionments developed for a state's own legislative apportionments

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[20] It is not entirely clear why Justice Black, writing for the *Wesberry* court, chose not to reach the argument that violations of the "one person, one vote" principle in congressional apportionment constituted an equal protection violation. 376 U.S. at 8 n.10. The intrastate congressional apportionment at issue in *Wesberry* was clearly state action subject to the Fourteenth Amendment. Nevertheless, it implicated equal protection principles in a federal setting. The suggestion has been made that Justice Black was less than comfortable jurisprudentially with the effective reverse incorporation of the equal protection language of the Fourteenth Amendment in the Fifth Amendment due process clause undertaken by *Bolling v. Sharpe*, 347 U.S. 197 (1954), in order to reach discrimination by Congress. *See generally*, Calabresi, *Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)* 105 Harv. L. Rev. 80, 132 n. 169 (1991). The use of Article I, Section 2 as the basis for the "one person, one vote" principle for congressional, as opposed to state legislative, apportionment, makes it possible to avoid such jurisprudential discomfort.

than is found in the approach to state congressional apportionments.

As we noted recently when dealing with a state legislative apportionment dispute:

> Federal courts are prepared to tolerate modest deviations from statistically ideal [state] electoral districts. In this connection a ten percent total deviation, computed by adding the individual deviations of the largest and the smallest districts from the ideal district has been developed to mark the upper limit of the *de minimis* acceptable range for divergence from population equality. *See Brown v. Thomson*, 462 U.S. 835, 842-43 (1983). Justification, however, will be required to uphold deviations of more than ten percent because "a State's policy urged in justification of disparity in district population, however rational, cannot constitutionally be permitted to emasculate the goal of substantial equality." *Mahan v. Howell*, 410 U.S. 315, 326 (1973).

Black Political Task Force v. Connolly, 679 F. Supp. 109, 114 (D.Mass. 1988) (three-judge court).

The Supreme Court has suggested that the differential degree of deference accorded state congressional apportionment decisions, as opposed to purely state legislative apportionments, is a consequence of the different constitutional sources of the mandates for population equality in those respective apportionments. *Gaffney v. Cummings*, 412 U.S. 735, 741-42 (1973) ("there are fundamental differences between congressional districting under Art. I . . . and state legislative reapportionments governed by the Fourteenth Amendment"). Although not fully articulated by the Court, those differences appear to

relate to the role the several states play in the respective apportionment processes.

Under Article I, Section 2, the state acts as delegate of the federal government in implementing a matter of federal governmental organization. The federal government is entitled to exercise strict control over the incidents of its own structure. Through its construction of Clause 1, and in the absence of action by the Congress,[21] the Supreme Court has read the constitutional text to provide that strict control. By contrast, the states are entitled to some latitude in defining the way in which they accommodate the various interests which come into play when they organize their own governmental structures. In arranging their own structures the states are not functioning as the delegatees of another sovereign but rather are implementing their own policies. State judgments under such circumstances are entitled to greater judicial consideration and deference.

3. *Congressional apportionment of congressional seats*

In the instant case, we deal with a dimension to reapportionment not previously addressed by the Supreme Court: the congressional responsibility for apportionment of its own institution. This is a responsibility which has elements of the structural considerations involved in both state congressional dis-

[21] Congress deliberately abandoned in 1929 its previous statutory directives that the States create congressional districts "containing as nearly as practicable an equal number of inhabitants." *Wood v. Broom*, 287 U.S. 1, 7 (1933). Given the lack of Congressional interest in enforcing this obligation, the Supreme Court in *Wesberry v. Sanders* reinvigorated the principle.

tricting and a state's own legislative districting. The structure of the assignment of power strongly suggests that deference be shown by the courts to the congressional determination. Congress is no mere delegatee assigned to carry out the apportionment policies of a separate sovereign; rather it is the department of government which, as Justice Story recognized in *Prigg v. Pennsylvania*, exercises powers in respect to congressional reapportionment "irresistibly flowing from the duty positively enjoined by the constitution." 41 U.S. (16 Pet.) at 619. Moreover, after Justice Story wrote, Congress was granted express constitutional authority to make reapportionment determinations. Clause 3 of Article I, Section 2 as amended by section 2 of the Fourteenth Amendment is expressly the subject of congressional authority by virtue of section 5 of that Amendment, which provides that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

The majority opinion of the only court to address the question of congressional apportionment of congressional seats, the District of Montana, has chosen to import the constitutional imperatives of state congressional reapportionment decisionmaking into its review of congressional apportionment by adopting wholesale the method of state congressional redistricting analysis applied in *Karcher v. Daggett. Montana v. United States Dep't of Commerce*, 775 F. Supp. at 1363-64. The dissent in the *Montana* litigation, while recognizing that *Karcher* was not "directly applicable," nevertheless suggested that the *Karcher* "burden shifting scheme . . . provide[s] a helpful analytic framework for evaluating the claims brought before us." *Id.* at 1368.

We are not persuaded that wholesale assimilation of the *Karcher* analysis into evaluation of congressional apportionment judgments is appropriate for the task. The congressional judgment on this issue, as we have noted, has not yet been the subject of Supreme Court direction, and greater consideration of the distinctive qualities of such a judgment by a separate and coequal branch appears to be required.

At the outset we face the question of standard of review. Previous apportionment case law provides no definitive guidance. As we recently observed, "[d]espite over a quarter century of litigation in this area, uncertainty remains concerning the proper standard of review for reapportionment plans." *Black Political Task Force v. Connolly*, 679 F. Supp. at 113. Yet, whatever uncertainty surrounds the problem of federal judicial review of state decision-making, the congressional judgment here falls into a different but familiar pattern. As an aspect of its exercise of enforcement powers under Section 5 of the Fourteenth Amendment, the congressional judgment regarding the implementation of the mandate of Section 2 of that Amendment—that House seats must be apportioned to the states "according to their respective numbers"—proceeds from "a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966). Thus, the standard of review here should be derived from

> [t]he classic formulation of the reach of [Congressional] powers . . . established by Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat. 316, 421: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

Id. at 650.

We need not be drawn into the thorny debate over the precise scope of congressional power under Section 5. *See, e.g., EEOC v. Wyoming*, 460 U.S. 226, 251-59 (1983) (Burger, C.J., dissenting); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Oregon v. Mitchell*, 400 U.S. 112 (1970). This is because the exercise of Section 5 powers here in defining the methodology for reapportionment falls squarely within the settled recognition of the competence of Congress as a legislative fact finder. As Professor Cox has observed, the courts have "long been committed both to the presumption that facts exist which sustain congressional legislation and also to deference to congressional judgment upon questions of degree and proportion." Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 Harv. L. Rev. 91, 107 (1966).

The plaintiffs contended at oral argument that the standard "is essentially strict scrutiny or, put another way, the extraordinary rigor applied by the federal courts to apportionment challenges. It's that sort of very, very strict type of standard to determine whether or not the method produces the most equal congressional districts that it can produce." As a consequence, plaintiffs contend "there shouldn't be any extraordinary deference to Congress." To the extent that plaintiffs' proposed standard of "extraordinary rigor" would require, more readily than *McCulloch*

anticipates, that courts interpose a judicial judgment for one of Congress, we reject it.

The defendants for their part contend that our review must be wholly deferential unless the congressional judgment offends some express textual limitation in the Constitution. To the extent that this formulation is intended to exclude from our consideration the "one person, one vote" principle derived in *Wesberry* from the perceived intent which animated the words "by the People of the several States" in Article I, Section 2, Clause 1, we reject the defendants' efforts to narrow the limitations on congressional action. Rather, we believe the "one person, one vote" principle is implicit in the letter and animates the spirit of the Constitutional requirements on this question. We turn then to an evaluation of whether the means chosen for giving expression to the Constitution's apportionment directives by Congress in § 2a are "plainly adapted to that end [and] are not prohibited." *McCulloch*, 17 U.S. (4 Wheat.) at 421.

D. The Constitutionality of the Congressional Judgment

The *Montana* court majority embraced the harmonic means (Dean) method of apportioning House seats among the states as the single constitutionally acceptable methodology for achieving that task. The plaintiffs here contend that the major fractions (Webster) method is the sole constitutionally acceptable methodology. Congress has adopted neither but has instead chosen the equal proportions (Huntington-Hill) method and codified it in 2 U.S.C. § 2(a). We will not disturb the congressional choice. While other choices may also be permitted, the one Congress actually made is not prohibited by the Constitution. And

it is plainly adapted to the end of approximating as close as practicable the goal of "one person, one vote."

The *Montana* court's determination was a conclusion from the following syllogism:

> The ideal district reflects the size of each district if it were possible to truly achieve equal representation for equal numbers of people—the goal mandated by the Constitution. Any difference from the ideal reflects unequal representation. Thus, absolute difference from the ideal district is the proper criterion to use in determining whether Congress has met the goal of equal representation.

Montana v. United States Dep't of Commerce, 775 F. Supp. at 1364. Because, as the 1928 NAS study observed, the harmonic means (Dean) method is most successful in achieving the measure of equity reflected by absolute difference in the number of persons per representative, the *Montana* court concluded the matter Q.E.D. as to the singular constitutionality of the Dean method.

The plaintiffs in this case offer a different syllogism. Plaintiffs argue in their reply submission

> that the constitutional requirement of "one person, one vote" is best met by minimizing the absolute difference between each person's share of a representative. As defendants have conceded, the Webster method is "optimal" with respect to this measure of inequity. The Webster method, therefore, best satisfies the requirements for a constitutional apportionment formula.

Plaintiffs' Reply to Defendants' Memorandum in Opposition to Plaintiffs' Motion for Summary Judg-

ment at 5 (citations omitted). Thus, because, as the 1928 NAS study observed, the major fractions (Webster) method is most successful in achieving the measure of equity reflected by absolute difference between each person's share of a representative, the plaintiffs would have us conclude the matter Q.E.D. as to the singular constitutionality of the Webster method.

The NAS Report relied upon by Congress by contrast found that the equal proportions (Huntington-Hill) method was optimal in relative terms in reducing the variation between the number of persons per Representative and each person's share of a Representative.

The *Montana* court and the plaintiffs treat the issue as if it were capable of resolution by resort to dispositive mathematical formulae. But the real world environment in which these formulae are employed makes strict mathematical equality an elusive—and illusory—goal. As Judge O'Scannlain observed in his *Montana* dissent:

> the standard of precise numerical equality announced in [*Wesberry* and *Karcher*] is impossible to apply. We engage in a fundamentally different inquiry. Although population equity among districts is a guiding principle, because of the constraints imposed by the Constitution it is impossible to have districts that are even approximately equal in size. Indeed, application of any of the apportionment formulae before this court results in congressional district populations varying by hundreds of thousands of people between states.

Montana v. United States Dep't of Commerce, 775 F.Supp at 1369 (O'Scannlain, J., dissenting).

More importantly, we can find nothing in the Constitution mandating that a particular mathematical formula be employed to the exclusion of others. If, as Justice Holmes reminded us, "[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics," *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes J., dissenting), we find it difficult to believe that Article I, Section 2 enacted a particular mathematical formula to the exclusion of other approaches for obtaining equality "as nearly as is practicable," *Wesberry v. Sanders*, 376 U.S. at 8. Indeed, the plaintiffs' expert in his writings has asked and accurately answered the largely unanswerable rhetorical question in this regard: "Why choose . . . one divisor criterion [rather] than another? . . . [T]here is no *a priori* justification for choosing one test or measure of inequality over another." Balinski & Young, *The Quota Method of Apportionment*, 84 Am. Mathematical Monthly 701, 709 (Aug.-Sept. 1975).

In all this, the plaintiffs' fundamental proposition—shared, albeit with a different formula, by the *Montana* court—is that apportionment equality is to be measured on an absolute and not a relative basis. But, that has not been the exclusive—or even the principal—grounds on which the federal courts have evaluated apportionment equality in the infinitely less mathematically complex environment of intrastate apportionment controversies. Rather, the courts have consistently measured equality by relative departures from the ideal district. For example, in each of the apportionment cases cited by the *Montana* court itself, 775 F.Supp. at 1364, relative differences from the ideal are used as a critical element of evaluation. We have ourselves employed that measure in previous re-

districting litigation. *Black Political Task Force v. Connolly*, 679 F. Supp. at 123-25. We are satisfied that relative measurement is a mathematically acceptable means by which to make equity comparisons and nothing in the case law requires decision makers to disregard it. Certainly nothing in the Constitution prohibits it.

Plaintiffs have focused their attack on the congressionally approved equal proportion (Huntington-Hill) method by arguing that, as against the major fractions (Webster) method, the equal proportions (Huntington-Hill) method has been demonstrated to be biased against larger states. The plaintiffs' historical bias argument depends upon certain assumptions about how to treat the smallest states, which receive at least one congressional seat irrespective of their population. When the core assumption used here by plaintiffs' expert—that only those states with a quota less than .5 should be excluded—is modified to exclude states with quotas below 1.0, the historical bias showing made by plaintiffs all but evaporates. Moreover, it appears that for the current apportionment at issue in this case the equal proportions (Huntington-Hill) method yields a percentage bias closer to 0 than would the major fractions Webster method.

In light of the special constitutional protection afforded small states with the guarantee of one House seat—and given the willingness of plaintiffs' own expert to use the 1.5 exclusion assumption himself when working with the data on behalf of the Congressional Research Service of the Library of Congress[22]—we find that the use of any exclusion—at least up to a

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[22] M.L. Balinski & H. P. Young, Evaluation of Apportionment Methods 9 (Sept. 30, 1984) (Library of Congress Contract No. CRS 84-15).

quota of 1.5—as a means of accounting for the special treatment of small states is reasonable. Thus, plaintiffs' bias arguments do not demonstrate the equal proportions (Huntington-Hill) method to be unconstitutional.

Plaintiffs other principal argument is based on departures from quota. But the showing here is at best mixed. It is the greatest fractions (Vinson) method—with its unacceptable potential for population paradoxes—which is most successful in minimizing departures from quota. The major fractions (Webster) method does bring every pairing of states as near as possible to their quota in absolute terms and in terms of the percentage difference of a state's House seat allocation from its exact quota. However, the equal proportions (Huntington-Hill) method is more successful in minimizing the relative difference between a state's House seat allocation and its exact quota.

We have briefly canvassed the respective arguments for the various methods to illustrate that this is a question which has generated lively and learned dispute among skilled mathematicians. They variously rely upon competing formulae, methodologies and standards. We share the view expressed by Professor Young in 1981 testimony before the House Subcommittee on Census and Population, that the question presented "is a complex problem and some of the Nation's finest mathematicians have foundered on it. There is no perfect method. There is no method that satisfies all possible criteria of reasonableness." *Census Activities and the Decennial Census: Hearing on H.R. 1990 Before the Subcomm. on Census and Population of the House Comm. on Post Office and Civil Service*, 97th Cong., 1st Sess., 43 (1981) (Statement of Peyton Young).

We de not find in this extraordinarily technical dispute any basis for engrafting on the Constitution mathematical prescriptions as to formulae, methodology or standards. The Constitution does not prescribe a particular formula, a specific methodology or a set standard to embody the "one person, one vote" principle in this complex setting.

It is apparent that Congress has confronted the technical dispute at issue before us directly and it has returned to it with some regularity. It has chosen one reasonable method to ensure that in the apportionment of House seats among the states as near as is practicable one person's vote in a congressional election will be worth as much as another's. Congress having adopted a method which is appropriate—if not singularly so—to that end and not, in any event, prohibited by the Constitution, we have no authority to interpose a different method. The equal proportions (Huntington-Hill) method chosen by Congress embodies the letter and spirit of the "one person, one vote" principle. The Courts can ask no more of the Congress.

III

THE OVERSEAS CENSUS CLAIMS

> ". . . counting the whole number of persons *in each State* . . . The Actual Enumeration shall be made . . . *in such Manner as* [*the Congress of the United States*] *shall by law direct.*"
>
> U. S. Const. art. I, § 2, cl. 3 (emphasis supplied)

The census is the foundation upon which congressional apportionment is undertaken. Accounting for the United States population in the census involves two sets of rules: 1) enumeration rules, which determine who should be counted; and 2) residence rules, which determine where they should be counted. Congress has delegated to the Secretary of Commerce and the Bureau of the Census the authority to establish those rules. In developing residence rules for the 1990 census, the Secretary reversed the historic practice for counting overseas government personnel. Despite conceded limitations in the data used to do so, the Secretary chose for 1990 to allocate overseas personnel to the several states for residence purposes. This allocation was sufficient to provide the State of Washington with an additional congressional seat while reducing the Massachusetts congressional delegation by one seat. The plaintiffs contend that the Secretary's reversal of the overseas personnel residence rule was arbitrary and capricious and a violation of the constitutional requirement that residence for apportionment purposes requires "counting the whole numbers of persons *in* each state." U. S. Const. art. I, § 2, cl. 3 (emphasis supplied).

In order to address the merits of plaintiffs' claims, we first turn to the relevant texts and their implications, followed by a discussion of the historical census practice—particularly the implementation of "usual residence" concept by those charged with administering the census program. We then address the standards for judicial review of census practices before considering the propriety of the Secretary's action. Finding the Secretary's action improper, we outline a conditional remedy.

A. The Relevant Constitutional and Statutory Texts and Their Implications

The requirement of Article I, Section 2, Clause 3, that a census be conducted every ten years in such a

manner as Congress shall by law direct is focused upon the need to have accurate population figures with which to apportion seats in the House of Representatives. But that core focus has not been treated as a constraint on the range of the congressional census powers. As the Supreme Court noted less than a century after the Constitution was enacted:

> The Constitution orders an enumeration of free persons in the different States every ten years. The direction extends no further. Yet Congress has repeatedly directed an enumeration not only of free persons in the States but of free persons in the Territories, and not only an enumeration of persons but the collection of statistics respecting age, sex, and production. Who questions the power to do this?

Knox v. Lee (The Legal Tender Cases), 79 U.S. (12 Wall.) 457, 536 (1871). And, as the Court recently observed,

> [A]lthough the national census mandated by Art. I, § 2, of the Constitution fulfills many important and valuable functions for the benefit of the country as a whole, its initial constitutional purpose was to provide a basis for apportioning representatives among the states in the Congress. The census today serves an important function in the allocation of federal grants to states based on population. In addition, the census also provides important data for Congress and ultimately for the private sector.

Baldridge v. Shapiro, 455 U.S. 345, 353 (1982).

Congress has delegated its census authority to the Secretary of Commerce ("the Secretary") by the Census Act, 13 U.S.C. §§ 141 *et seq.*, which permits

the Secretary to conduct the decennial census "in such form and content as he may determine." *Id.* at § 141(a). The first Census Act was enacted in 1790 by the First Congress, in response to the Apportionment Clause's mandate that the first decennial census be conducted within three years of the adoption of the Constitution. The Census Act of 1790 enunciated the "usual residence" concept:

> That every person whose usual place of abode shall be in any family on the aforesaid first Monday in August next, shall be returned as of such family and the name of every person, who shall be an inhabitant of any district, but without a settled place of residence, shall be inserted in the column . . . which is allotted for heads of families, in that division where he or she shall be on the said first Monday in August next and every person occasionally absent at the time of the enumeration [shall be returned] as belonging to that place in which he usually resides in the United States.

Act of Mar. 1, 1790, § 5, 1 Stat. 101, 103.

The parties have stipulated that, while the current version of the census legislation does not contain an express "usual residence" provision, "[s]ince the first census in 1790, the Census Bureau has used the concept of 'usual residence' as the guiding principle in formulating enumeration and residence rules for the conduct of each census." This principle directs that persons should be included in the census residence counts at the place where they are living and sleeping most of the time, as of the date that the census is taken.

B. Historical Development [23]

It appears that the question of how to allocate for apportionment purposes Americans serving abroad at the time of the census was not considered by the drafters of the Constitution. Indeed, there is

> no indication that the members of the Constitutional Convention had in mind any specific criteria by which persons were to be deemed residents of one State rather than another. It is most likely that they thought in terms of an average inhabitant, whose actual location at the time of the census, domicile, and legal residence would be the same. The fringe problem of persons actually living on the date of the census in places other than the places of their domicile or legal residence was not considered.

Borough of Bethel Park v. Stans, 319 F. Supp. 971, 974 (W.D.Pa. 1970), *aff'd*, 449 F.2d 575 (3d Cir. 1971).

The question of counting American military personnel not serving in one of the United States, however, has been addressed with relative consistency throughout the two centuries of this country's history. With the exception of 1970 and 1990, such persons have been counted where they are serving but have not been allocated to individual states for apportionment purposes.[24]

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[23] The history presented in this section is drawn from the Stipulation of Facts filed by the parties, the Administrative Record of the Secretary's decision, and the various supporting exhibits submitted by the parties.

[24] Military personnel are not the only class of persons presenting the problem of how to account in the census for people actually living on the date of the census in places other than

From the nation's beginning, there have been soldiers posted to duty stations outside the admitted states of the Union. Throughout the nineteenth cen-

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what might be considered their domicile or legal residence. Census administrators have developed various methods for dealing with the subclasses of persons presenting the problem. These methods have reflected contemporary societal views about what location should be designated as the "usual residence" for such a person and the administrative practicability and accuracy of making a count of a member of the subclass at a particular location. Among the subclasses receiving distinctive and sometimes evolving treatment are:

Boarding Students—For the 1900 and all subsequent censuses, boarding school students have been counted at their parent's residence even if they were living and sleeping at school on the census day. The same was true of college students until the 1950 census and thereafter when, in apparent recognition of a college student's greater degree of emancipation, the residence rules were modified to count college students at their schools, if they were there rather than at the families' homes on census day.

Other Americans Living Overseas—American citizens not employed by the federal government living overseas as of the census date have not been included in the apportionment courts for congressional seats. In 1830 and 1840 and in every census since 1900, however, the Census Bureau has, however, made an effort to obtain an administrative count of such persons for other than apportionment purposes.

Crews of Merchant Vessels—Traditionally, the crew of United States ocean-going, coastal and Great Lakes vessels have been counted at the port at which the ship was berthed on census day. If their vessel was not berthed, but was in United States territorial waters, the crew would be counted at the port of destination so long as that port was inside United States territory. If the vessel was in territorial waters, but headed overseas, it would be counted at the vessel's home port. If the vessel was not in territorial waters, the crew was not counted. The Census Bureau has recognized that the crews of merchant vessels are very transient. Some have no home other than the ship on which they work; others

tury, those persons serving at forts and posts in the western territories, for example, were counted where they were stationed. Similarly, despite the apparent short-run political disadvantage to the states which had not been a part of the Confederacy, northern troops serving in the occupied southern states were apparently counted in 1870 at their sites of posting in the former Confederacy.[25]

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maintain a home on shore which they consider their usual residence. For the 1990 census, the Census Bureau made an effort to count crew members at what the crew members themselves considered to be their usual residence, whether on ship or on shore.

[25] This treatment of the military was consistent with the political accommodations which governed the constitutional choices shaping the apportionment provisions of Article I, Section 2. Choosing whom to count for purposes of apportionment was the major issue during the nation's two fundamental constitutional drafting periods: the framing of the initial document in 1787 and the consideration of amendments following the Civil War. The Great Compromise, which resulted in the approval of the Constitution by the delegates to the Constitutional Convention in 1787, involved the decision to count all persons inhabiting the individual states, whether male or female, franchised or disenfranchised, with a special provision for counting slaves as 3/5ths of a person, so as not to provide the South with too great an electoral advantage for the persons it would not free. Following the Civil War, the Congress, in framing the Reconstruction amendments to the Constitution, again considered who should be counted for apportionment purposes. Proposals to base "representation upon the number of legal voters . . . encountered strong opposition from New England's Representatives. New England, which restricted aliens from voting, imposed educational requirements in granting suffrage, and had a disproportionately large number of women (who were universally excluded from voting at the time) due to an extensive emigration of her males to the West, felt that it had much to lose from a voters' basis of representation." Zuckerman, *A Consideration of the*

In 1880, a residence instruction to census enumerators—adopted formally for the 1850 census and thereafter—which treated a military garrison as a separate household for purposes of residence counts, was crystallized in an express special instruction for military personnel. This instruction provided that "[a]ll soldiers of the U.S. Army, and civilian employees, and other residents at posts or military reservations will be enumerated in the district in which they reside, equally with other elements of the population." Land-based members of the military, including the Coast Guard, continue to be counted where they are permanently stationed, provided it is within the United States or its territories.

Commencing with the census in 1900,[26] all overseas federal personnel were counted at their duty stations as part of the nation's total population but were not allocated to states for apportionment purposes. In a 1949 opinion rendered for the Director of the Census, the Attorney General of the United States determined the practice of not allocating overseas military personnel to particular states to be

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History and Present Status of Section 2 of the Fourteenth Amendment, 30 Ford. L. Rev. 93, 95 (1961). The Reconstruction Congress, after providing that newly-freed slaves would be fully counted, continued to treat the apportionment population as the inhabitants of the states, irrespective of whether they were voters or citizens.

[26] The 1900 census, occurring while the nation was concerned about Americans serving abroad as a result of the Spanish American War, presents something of an anomaly because it appears that the instructions for enumerators permitted double counting. Thus, overseas federal personnel were counted at their posts but the enumerators were also instructed that if an overseas federal employee was a member of a family within a state, the employee should be reported as resident in that State.

> a practical interpretation of the legislation governing the decennial censuses by the official charged with the execution of that legislation. He has consistently followed the practice in question over a long period of time, and it has not been challenged in Congress or elsewhere.

The Attorney General concluded that the practice was well within the Census Bureau's discretion.

During the peak of the Vietnam War in 1970, the Census Bureau modified this consistent practice by choosing for the first time in the nation's history to allocate overseas personnel to the states for congressional apportionment—but no other—census purposes, on the basis of the employee's designation of a "home state" in administrative records maintained by the employing federal agency. This reversal was preceded by an 1969 opinion letter from the Assistant Attorney General for the Office of Legal Counsel, expressing the view "that the Director of the Census may, in his discretion, validly adopt that procedure." This opinion letter was premised on the assumption that "the factors which led to the Director's former practice with regard to enumeration of persons living abroad—primarily, difficulties in securing reliable information and substantial expenses of allocation—are now largely inapplicable." In the wake of the 1970 census, it became clear that the assumption upon which the 1969 opinion was based was not settled.

Following the 1970 census, the Census Bureau expressed the view that the agency administrative records purporting to show "home state" were of "unknown reliability." This lack of reliability, coupled with the substantial reduction in the number of Americans serving abroad, led the Census Bureau to announce in 1975 that it had determined not to

include overseas military in future apportionment counts, but to include them only in the overall count of the American population.

Thus, the 1980 census returned to the historic practice under which overseas federal employees were not included in the apportionment counts. The planning for the 1990 census initially anticipated that the same historic practice would be employed again. In a 1987 Policy Paper defining the enumeration and residence rules for the 1990 census, the Census Bureau stated it would "not include [counts of military personnel and their dependents living overseas and of federal civilian employees and their dependents living overseas] in the official totals for the states since the assignment to geography would be arbitrary and operationally difficult."

Despite subsequent congressional interest in modifying this historic practice, as evidenced by a number of proposed bills—none of which were enacted—seeking to require the inclusion of overseas military personnel in apportionment counts, the Census Bureau and the Department of Commerce continued to maintain throughout 1987, 1988 and well into 1989 that the 1990 census counts for apportionment would not and should not include military personnel living outside the United States on the census day. The Acting Assistant Attorney General for the Office of Legislative Affairs of the Department of Justice, in commenting on proposed legislation in 1988, even expressed "serious doubts as to the constitutionality of any legislation that would seek to include for apportionment purposes military personnel, DOD civilian employees, or their dependents when such individuals live outside the United States."[27]

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[27] The letter expressing this view, which was primarily directed to proposed legislation seeking to eliminate illegal

In an about-face, however, on July 31, 1989, defendant Secretary Mosbacher decided that the 1990 census would include counts of overseas federal employees for purposes of congressional apportionment. Mosbacher adopted a two-page decision memorandum setting forth three basic factors for the reversal of policy.

First, from a political perspective, the memorandum proposed "[t]o satisfy what appears to be a growing bipartisan concern of the Congress and to avoid unnecessary debate."

Second, from a factual perspective, the memorandum reported that the Department of Defense would be conducting a census of its military and civilian employees and consequently "it is now feasible to provide the necessary counts of usual residents" in a timely manner.

Third, from a legal perspective, the memorandum referred to the 1969 opinion letter of the Assistant Attorney General rendered in connection with the 1970 census, concluding that such a policy decision was in the discretion of the Director of the Census.

The decision to reverse the historic overseas personnel census policy and incorporate a practice used once and then immediately abandoned in the next and most recent census was premised on one factual—as opposed to political or legal—assumption: the expec-

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aliens from the apportionment counts, betrays a certain lack of institutional memory in the Justice and Commerce Departments. The Acting Assistant Attorney General reported that "[t]he Department of Commerce advises that the Census Bureau has never counted for apportionment purposes . . . military personnel . . . stationed abroad." Apparently the Justice and Commerce Departments had forgotten that the Census Bureau had done precisely that eighteen years earlier upon the advice of another Assistant Attorney General.

tation of better procedures by the Department of Defense. That assumption was shortly thereafter undermined. In December 1989 the Defense Department cancelled its planned census of military and civilian employees. Following unsuccessful efforts to identify other means to determine the usual residence of overseas military personnel, the Census Bureau and Department of Defense finally returned again to the basis used in, and then dropped after, the 1970 census—the "home of record" listed in Defense Department records—as the method for apportioning overseas personnel.

Although the core of the overseas census counts was the "home of record" data contained in Department of Defense records for military personnel, augmentation was necessary to complete the overseas counts. Thus, if the Defense Department had no home of record for a member of the military, the Department would use the member's legal residence or, failing that, the last duty station. Even after that augmentation, 1,846 military personnel and dependents who were counted in the census could not be apportioned to states because their home states could not be determined.

Efforts to allocate civilian overseas personnel for apportionment purposes were even less complete. Lacking any home of record information for its civilian personnel, the Defense Department circulated questionnaires to 61,205 of these personnel. The dependents of these employees were to be assigned on the basis of the employee responses. Only approximately twenty percent of the civilian employees completed the questionnaires. Consequently, some eighty percent of civilian Defense Department overseas personnel and their associated dependents were not assigned to a state for apportionment purposes.

Meanwhile, of the forty federal agencies asked to submit counts of their overseas employees for apportionment purposes, only thirty actually did so. And of these thirty, only twenty included dependents. Four of the thirty agencies reporting could not provide a home state for all their overseas employees.

C. Judicial Standards

The Supreme Court has not had occasion to address what standards, if any, are available to employ in judicial review of Census Bureau determinations. The proliferation of litigation during the past quarter century presenting challenges to census procedures, methods and results has, however, more or less consistently relied upon familiar standards of review. These are essentially the "arbitrary and capricious" and "abuse of discretion" standards codified in the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). *See, e.g., City of New York v. United States Dep't of Commerce*, 713 F. Supp. 48, 54 (E.D.N.Y. 1989) (arbitrary and capricious); *Cuomo v. Baldridge*, 674 F. Supp. 1089, 1105 (S.D.N.Y. 1987) (arbitrary and capricious); *City of Willacoochee v. Baldridge*, 556 F. Supp. 551, 555 (S.D.Ga. 1983) (arbitrary and capricious); *Carey v. Klutznick*, 508 F. Supp. 420, 430 (S.D.N.Y.) (arbitrary, capricious or an abuse of discretion), *aff'd*, 637 F.2d 834, 838-39 (2d Cir. 1980) ("reviewable as to reasonableness of or irrational basis for methods used") (citation omitted); *City of Philadelphia v. Klutznick*, 503 F. Supp. 663, 677 (E.D.Pa. 1980) ("free of arbitrariness, capriciousness and fraudulent conduct"); *Borough of Bethel Park v. Stans*, 319 F. Supp. at 977 ("procedure has a rational basis and represents a proper exercise of discretion"), *aff'd*, 449 F.2d 575, 579 (3d

Cir. 1971) ("fail[ure] to apply the proper criterion in a reasonable manner or its application lacked a rational basis"); *West End Neighborhood Corp. v. Stans*, 312 F. Supp. 1066, 1068 (D.D.C. 1970) (rational basis); *Quon v. Stans*, 309 F. Supp. 604, 607 (N.D.Cal. 1970) ("not irrational, arbitrary, or capricious").

Despite this substantial body of lower court authority for a rational basis, arbitrary and capricious, or abuse of discretion standard in the review of Census Bureau actions, the defendants argue that their actions are not subject to judicial review at all. Relying upon *Webster v. Doe*, 486 U.S. 592 (1988), the defendants contend that judicial review of the choice of where to assign the residence of overseas personnel is barred under the Administrative Procedure Act. Defendants further contend that to the degree judicial review is available, their decisions with respect to the overseas census apportionment count were rational, were not arbitrary and capricious or an abuse of discretion and hence, were not violative of either the Administrative Procedure Act or the Constitution.

D. The Impropriety of the Administrative Action

1. *The Inapplicability of Section 701(a)(2)*

In *Webster*, the Supreme Court addressed the standards for determining whether a dispute over a federal agency determination fell within the "very narrow exception," *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971), provided by the Administrative Procedure Act, 5 U.S.C. § 701(a)(2), barring judicial review of "agency action . . . committed to agency discretion by law." Relying on *Heckler v. Chaney*, 470 U.S. 821, 830 (1985), for the proposition that "review is not to be had if the statute

is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion," the *Webster* court reaffirmed the requirement that evaluation under § 701(a)(2) requires "careful examination of the statute on which the claim of agency illegality is based." 486 U.S. at 600.

The basic grant of statutory authority to conduct the census is plainly drawn in discretionary terms. Section 141(a) of Title 13 vests discretion in the Secretary of Commerce to take the census "in such form and content as he may determine." Standing alone, this is a statutory grant which "fairly exudes deference," *Webster v. Doe*, 486 U.S. at 600, to the Secretary. But it is not the only statute providing governing law. Section 141(b) imposes on the Secretary a duty to perform a "tabulation of the total population by states . . . as required for the apportionment of Representatives in Congress among the several states." The purpose of that statutory duty is to permit the President to meet his statutory obligation under 2 U.S.C. § 2(a) of transmitting "to the Congress a statement showing the whole number of persons *in* each state." *Id.* (emphasis supplied). Thus the discretion exercised by the Secretary, at least with respect to the apportionment counts, is cabined by a duty to take a census which produces a tabulation providing the whole number of persons in each state. Moreover, the basic statutory structure governing the Secretary's apportionment census counts has been refined further by the "usual residence" policy that has governed census determinations since the First Census Act.

Viewed from a pragmatic perspective, *see generally* Levin, *Understanding Unreviewability in Administrative Law*, 74 Minn. L.Rev. 689 (1990), we find nothing in the Secretary's functional responsibilities with respect to the census to suggest that Congress intended his exercise of discretion to be immune from judicial review. Rather, the relevant pragmatic considerations support judicial review for arbitrariness, capriciousness, and abuse of discretion. The core purpose of the census is to provide a reliable and unmanipulated calculation for the allocation of House seats and for access to other government perquisites and benefits. The consequence of the census can be profoundly influential in the balance of advantage among competing partisan and parochial interests. It is especially appropriate to have some review by the courts, as the disinterested branch of government, in order to insure a neutral process and safeguard the interests of the potentially disadvantaged in the conduct of the census. There are no unsually sensitive considerations in the subject matter—such as considerations of national security or foreign affairs—which could be compromised by judicial review. Nor have the defendants even attempted to demonstrate how traditional judicial review of the Secretary's administrative action might limit his effectiveness in discharging his role in respect to the census. The defendants have failed to meet their burden of adducing "clear and convincing evidence" to show a basis to restrict access to judicial review. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140-41 (1967) (citations omitted).

We find that the language and overall architecture of the statutory scheme for the census, as it governs apportionment counts, provides a basis for principled judicial review. The relevant texts and administrative tradition provide a judicially manageable body

of law to apply. The case law in census disputes during the past quarter century reflects the development of a common law of judicial review of agency action with respect to the census, *cf. Webster v. Doe*, 486 U.S. at 608-10 (Scalia, J., dissenting), in which the standard of review traditionally employed by courts in their review of agency action has been adopted. Accordingly, we are satisfied that § 701(a)(2) does not bar review of the Secretary's decision here. We turn to a consideration of the arbitrary and capricious standard set forth in § 706(2)(A).

2. *The Applicability of Section 706(2)(A)*

Certain basic principles governing application of this standard bear emphasis. "The scope of review under the 'arbitrary and capricious standard' is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Ins. Co.*, 463 U.S. 29, 43 (1983). Moreover, "the Secretary's decision is entitled to a presumption of regularity . . . . But that presumption is not to shield his action from a thorough, probing, in-depth review." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971) (citations omitted).

The Supreme Court has long recognized that " '[a] settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to.' " *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 41-42, (quoting *Atchison, T. & S.F.R. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 807-08 (1973)). Consequently, "[a]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) (quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1981)). *See also Wilcox v. Ives*, 864 F.2d 915, 925 (1st Cir. 1988) ("This inconsistency [of the agency's views] detracts considerably from the force of the Secretary's present view.") (citation omitted); *Mayburg v. Secretary of Health & Human Services*, 740 F.2d 100, 106 (1st Cir. 1984) ("An interpretation that has proved to be administratively workable because it is consistent and longstanding is typically more persuasive.").

The plaintiffs contend that the Census Bureau's reversal of its historic practice with respect to overseas federal personnel was arbitrary and capricious for three reasons: a) the Secretary relied upon inappropriate factors; b) the Secretary relied upon invalid data; and c) the Secretary failed to articulate a rational connection between the facts known and the policy he chose.

(a)—*Reliance Upon Improper Factors*—There is no question that agency action is arbitrary and capricious if an agency considers factors which Congress did not intend it to consider. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. The plaintiffs contend that the Secretary considered inappropriate "political" factors—what he adjudged to be the "growing bipartisan concern of the Congress"—to change the census practices with respect to overseas personnel counts. For their part, the defendants refer to this factor, somewhat disingenuously, as "legislative history," even though no formal legislative action ensued. We find the parties' respective advocatory la-

bels of the "growing bipartisan concern of the Congress" regarding overseas personnel counts to be less than helpful for analysis.

In the largest—and distinctly non-pejorative—sense, the expressions of congressional concern were, of course, "political." Various members of Congress, and in particular members of the House oversight committee, sought to encourage a change in policy. Their arguments—essentially that it is unfair in creating apportionment counts to ignore persons working overseas for the United States Government—address legitimate policy concerns. This is, after all, an area in which the Constitution, by providing that the census enumeration "shall be made . . . in such manner as [Congress] shall by law direct," U. S. Const. art. I, § 2, cl.3, has granted Congress virtually plenary control over census procedures and policies. It would be altogether inappropriate—and obviously politically foolish—for the Secretary to remain oblivious to statements of congressional concern about policy determinations delegated to him by Congress. Evaluation of the policy views of members of Congress responsible for and interested in census practices is a wholly appropriate aspect of the administrative process and cannot be termed arbitrary and capricious.

On the other hand, the views of various members of Congress, however responsible for census oversight or interested in census practice, cannot be treated as dispositive unless and until those views are embodied in a formal action by Congress itself. The Supreme Court has warned against being too "quick to infer a congressional mandate" from what it characterized as "inchoate legislative action." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 45. Moreover, if the expressions

of individual members' views appeared to be related to some partisan or parochial positions, a court would be justified in discounting such "political" factors when proffered in support of administrative decision making. Where, as here, however, the expressions of concern were concededly bipartisan and reflected a desire to have the census reflect the voting franchise rights of Americans serving their government overseas, we find no grounds to disregard the "political" policies advocated. Indeed, we believe that it would be arbitrary and capricious for the Secretary under these circumstances to blind himself to open, considered and reasoned expressions of individual and collective concern by members of Congress even if such expressions did not rise to the level of legislative enactments.

(b)—*Reliance Upon Invalid Data*—The point of difficulty with the Secretary's determination to reverse the overseas census policy is with the factual foundation. An agency decision may be found arbitrary and capricious if it is based upon invalid data. *City of Stoughton v. United States Envtl. Protection Agency*, 858 F.2d 747, 750 (D.C. Cir. 1988). The two page decision memorandum approved by the Secretary stated that a "significant" reason for reversing Census Bureau policy was that the Department of Defense would be conducting a census of its employees concurrently with the April 1990 national census. Indeed, this was the only factual basis ever articulated for the change. The Defense Department census was expected to generate the kind of reliable information about the home states of personnel that had not been available for previous census counts. The importance of the Defense Department's census undertaking for the Secretary's decision was under-

scored by the statement in the Secretary's decision memorandum that "[i]f other Federal agencies had a means of providing to us timely and acceptable counts of overseas employees, we would include them as well."

If the Secretary's decision-making were complete when he adopted the two-page decision memorandum in July 1989, we would not be prepared to say that his decision was arbitrary and capricious. The prospect of better data could support his decision. But events rendered that decision obsolete.

As it turned out, the Defense Department subsequently decided for budgetary reasons that it would not undertake its promised census count, and the express factual premise upon which the Secretary had changed the overseas federal employees apportionment policy evaporated. There is no evidence that the Census Bureau considered reverting to its prior policy of not apportioning the overseas employees to particular states. Instead, responding to what appear to have been inertial forces which did not permit even thinking about turning back once the policy reversal had been announced, the Census Bureau ultimately came to rely for the 1990 census on precisely the same data that it had consistently found to be too unreliable to apportion overseas federal employees.

The Census Bureau's traditional unwillingness to rely upon this data was well founded. As Congress had discovered, a service member's designation of "home of record" could be a place where that person had never lived or where that person had lived long ago at the time of enlistment, but to which there was no intention of returning. Furthermore, a Defense Department employee could also choose to designate as "home of record" a state to which that employee

had no ties, but which either imposed no state income tax or exempted service members from that tax. Thus, the agency's "home of record" documentation was suspect.

There is no showing in the Administrative Record that any of the deficiencies in the "home of record" information had been remedied since the 1970 census. Nowhere in the Administrative Record is there any basis for modifying the conclusions that reliance on "home of record" information would be "arbitrary," in the words of the Census Bureau's 1987 Policy Paper for the 1990 census,[28] or that the information failed to meet any "reasonable test to validity for apportionment purposes," in the words of the Defense Department's spokesperson in 1989 testimony before Congress.[29] Such information cannot provide a valid factual basis for the apportionment of overseas federal personnel among the states. And lacking a valid factual basis, the critical link between the facts found and the policy choice made was necessarily broken before the Secretary produced his official apportionment court for use in allocating seats in the United States House of Representatives among the states.

(c)—*Rational Connection Between Facts and Policy*—An agency action may be found arbitrary and capricious if the agency fails to articulate a satisfactory explanation for its action, including a " 'rational connection between the facts found and the choice made.' " *Motor Vehicle Mfrs. Ass'n.*, 463 U.S.

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[28] Administrative Record at 224.

[29] Administrative Record at 578, *Census Equity Act: Hearings on H.R. 2661 Before the Subcomm. on Census and Population of the House Comm. on Post Office and Civil Service*, 101st Cong., 1st Sess. 64 (1989) (Statement of Deputy Assistant Secretary Berteau).

at 43 (citations omitted). In this connection, of course, we recognize that the administrative agency responsible for the census must be "afforded wide latitude to select its methods, techniques and by those means to arrive at its own result." *City of Philadelphia*, 503 F. Supp. at 677. Yet, no matter how wide the latitude, there was no rational connection between the choice ultimately made and the facts actually found here.

Of the justifications offered for the Secretary's policy of reversal, all turned on the enhanced validity of the overseas census information to be used in the 1990 apportionment enumerations. The Defense Department had announced a special enumeration procedure and the Secretary announced reliance on it in his Decision Memorandum. The 1969 opinion letter of the Assistant Attorney General was premised upon the assumption that the Director's decision for the 1970 census to include overseas federal personnel in the apportionment count was reached after the "difficulties in securing reliable information" had been overcome. The experience with the 1970 census and thereafter demonstrated this assumption was unfounded. The Secretary, nevertheless, chose to use the demonstrably suspect "home of record" information for the 1990 apportionment count after the Defense Department's enumeration was abandoned.

At oral argument, counsel for the defendants contended that the Secretary, once having made the policy choice on the basis that the home of record information would not be used, was somehow committed to using that information when the underlying factual assumption became obsolete. Whatever may be the validity of such an argument when a complex set of interlocking events and circumstances renders re-

evaluation of the policy choice impracticable, that is not a compelling argument here. The Secretary was faced with the simple decision whether or not to include overseas federal personnel population counts in the apportionment statement to be submitted to Congress. The decision not to do so—the only decision which could have been rational under these circumstances—required nothing more than subtracting the arbitrary overseas counts from statements of state populations previously developed or declining to add the arbitrary overseas counts to the regular apportionment counts. In either case, this was simple arithmetic which could be performed instantaneously. Inertia cannot supply the necessary rationality to permit concededly invalid data to be incorporated in the apportionment counts. The decision ultimately to include the overseas census counts in the apportionment census lacks any rational connection between facts found and choice made and is thus arbitrary and capricious and an abuse of discretion in violation of the Administrative Procedure Act.

In reaching this conclusion, we do not mean to suggest that the Secretary could not, on a proper record, choose to change his policies with respect to the counting of overseas personnel. We recognize the broad discretion which the Secretary has in this regard under the Constitution and the relevant statutes. There would appear to be nothing inherently unconstitutional in a properly supported decision to include overseas federal employees in apportionment counts. We are consequently skeptical of the plaintiffs' contention that by apportioning overseas federal employees to particular states, the Census Bureau has violated Section 2 of the Fourteenth Amendment, which requires the Bureau to count "the whole number of persons *in each State*" (emphasis supplied).

The plaintiffs argue that, by definition, persons posted abroad at the time of the 1990 census were not *in* any state, and thus should not be included in the apportionment count. The contention that the language of the Fourteenth Amendment should be applied literally (i.e., that apportionment should only be based on a person's actual physical presence in a state on census day) finds no support in the case law. Courts have interpreted the "in each state" language of the Fourteenth Amendment to mean actual inhabitants of a state, that is, persons with some relation to the state—not simply those physically in the state on census day.

In *Wesberry*, the Supreme Court held the delegates at the Constitutional convention intended that the number of congressional seats "assigned to each State should be determined solely by the number of the State's inhabitants." 376 U.S. at 13. Similarly, as we have noted, in *Borough of Bethel Park*, where the court considered the plaintiff's claim that overseas federal personnel should be apportioned to particular localities,[30] the court concluded that there was "no indication that the members of the Constitutional Convention had in mind any specific criteria by which persons were to be deemed residents of one state rather than another. It is most likely that [the Framers] thought in terms of an average inhabitant." 319 F. Supp. at 974. Allocation of what the *Bethel Park* court referred to as the "fringe" populations has long been considered a discretionary decision open to revision as time unfolded and circumstances developed. The Attorney General's 1949 opinion noted that,

[30] The plaintiffs in that case did not challenge the Census Bureau's decision to apportion overseas federal employees to particular *states*.

"[t]he statutes governing the decennial censuses have uniformly left the actual administration of a great number of necessary details to the judgment and discretion of the Director of the Census." The flexibility of the "usual residence" concept as applied by the Census Bureau over the years, *see, e.g.*, note 24 *supra*, demonstrates the broad discretion the Bureau has traditionally enjoyed to interpret what the phrase "in each state" means. Contrary to the plaintiffs' contentions, the historical practice of the Census Bureau does not support application of the "in each state" language literally. Thus, we do not find persuasive plaintiffs' argument that the Secretary's overseas census decision was unconstitutional on its face.[31]

But the question presented by the arbitrary and capricious and abuse of discretion standard is not

[31] Nor do we find the decision to be in violation of the Census Act itself. Section 141 of Title 13 states that the Secretary of Commerce shall take a decennial census of the population "*in such form and content as he may determine.*" Thus, the statute gives the Secretary broad discretion to determine how the census will be carried out, discretion which mirrors the broad mandate given to Congress by the Apportionment Clause.

The plaintiffs do not dispute that the Census Bureau has the discretion to determine *how* to conduct the census. They contend, however, that the Census Act "severely circumscribes" the Bureau's discretion as to *who* shall be counted for purposes of apportioning seats in Congress.

This is a distinction without any purpose, for in determining how the census is to be carried out, the Bureau necessarily must determine who shall be counted, *i.e.*, the "content" of the census. The policy decision to apportion overseas federal employees is well within the discretion afforded the Census Bureau under the Census Act, assuming, of course, the exercise of that discretion is not—as we have found it was here—arbitrary and capricious or abused.

whether the Secretary has discretionary power to make properly supported policy determinations. Rather it is whether that undoubted broad discretion has been exercised properly. Confronted with an administrative record that shows no rational connection between the validity of the data upon which the Secretary relied and the decision he made to count overseas federal personnel, we have no choice but to find that the Secretary's exercise of discretion to include overseas federal personnel in the 1990 apportionment count was arbitrary and capricious, and an abuse of discretion.

E. The Remedy

We are intensely aware that the practical process of reapportionment following the 1990 census has been going on for over a year and that certain states—including Washington State, which the parties have stipulated will lose a congressional seat certified to it as the result of a determination that the overseas census count was invalid—have even completed their redistricting. We also recognize the potential likelihood of appeal of this decision.

Fashioning an equitable remedy in this setting to permit an orderly and timely electoral process will impose obligations on the Commonwealth of Massachusetts. As a matter of equity, unless Massachusetts is prepared to meet those obligations promptly, the status quo should not be disrupted. Thus, in order to insure that the consequences of our decision are not unduly disruptive, we will condition any affirmative remedy upon action of plaintiff Commonwealth of Massachusetts. We will require the Commonwealth of Massachusetts to submit on or before March 30, 1992, a certification affirming that there has been

prepared a fully approved eleven House seat reapportionment plan for Massachusetts based upon a 1990 census state population count which excludes overseas federal employees.[32] If the Commonwealth of Massachusetts fails to submit such a certification, no injunctive remedy will be afforded. Assuming such a certification is submitted, however, the Executive Branch defendants will be obligated to submit to defendant Anderson by March 31, 1992, a statement showing the number of Representatives to which each state would be entitled under the 1990 census, without inclusion of the overseas census counts in the apportionment count. The defendant Anderson then shall be obligated to send to the executives of the respective states on or before April 10 a recertification of entitlements to seats in the House of Representatives,[33]

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[32] We emphasize that we are entering our final order resolving the dispute between these parties. We do not purport to exercise any continuing jurisdiction over the substance of any eleven seat plan which is the subject of the certification called for in paragraph 5 of the Final Decrees and Orders we are issuing. We note that there is presently pending before a separate three-judge panel of this court a case concerning the approval of a ten House seat by the Commonwealth of Massachusetts. *Massachusetts Republican State Committee v. Connolly*, Civil Action No. 92-10205-H. Assignment of a case putting in question the substance of any plan certified under paragraph 5 will hereafter be undertaken in accordance with the Local Rules of the District of Massachusetts. *See generally* Rule 40.1 (A) (3) & (E).

[33] We understand from the parties' stipulation that this recertification as a practical matter will affect only the states of Massachusetts and Washington. Because Washington State, as the result of the decision of the *Montana* court, has since October 18, 1991 faced the prospect of reducing its congressional delegation to eight seats, the potential for reapportionment arising from our judgment in this litigation

in accordance with the recalculated apportionment statement prepared by the Executive Branch defendants.

IV

For the reasons set forth more fully above, we hereby ALLOW defendants' motion for summary judgment as to the apportionment claim and ALLOW plaintiffs' motion for summary judgment as to the overseas census claim grounded upon a violation of the Administrative Procedure Act. A set of final decrees and orders reflecting this judgment shall issue.

/s/ Douglas P. Woodlock
DOUGLAS P. WOODLOCK
United States District Judge

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should pose no additional practical difficulties for her in terms of contingency planning.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 91-11234-WD

COMMONWEALTH OF MASSACHUSETTS, EDWARD F. BERLIN AND KAREN J. KEPLER, PLAINTIFFS,

v.

ROBERT MOSBACHER, AS SECRETARY OF THE UNITED STATES DEPARTMENT OF COMMERCE; MICHAEL DARBY, AS UNDERSECRETARY OF ECONOMIC AFFAIRS OF THE UNITED STATES DEPARTMENT OF COMMERCE; THE BUREAU OF THE CENSUS; BARBARA BRYANT, AS DIRECTOR OF THE BUREAU OF THE CENSUS; GEORGE HERBERT WALKER BUSH, AS PRESIDENT OF THE UNITED STATES;AND DONNALD K. ANDERSON, AS CLERK OF THE UNITED STATES HOUSE OF REPRESENTATIVES, DEFENDANTS.

Before
Bownes, *Senior Circuit Judge*
Boyle, *District Judge*
Woodlock, *District Judge*

ON MOTIONS FOR RECONSIDERATION AND FOR STAY

March 13, 1992

Per Curiam. The defendants have alternatively moved for reconsideration of the judgment we entered in this case as to the overseas census claims, or, failing that, for a stay of the judgment pending appeal to the Supreme Court. The plaintiffs in response have filed a "Motion to Strike Post-Judgment 'Declarations'" submitted by the defendants in support of their motions. We will allow the plaintiffs' motion and we will deny the defendants' motions.

The substantive grounds adduced by the defendants in support of their motions fall into three distinct categories.

First, the defendants rehash arguments previously made and after full consideration, rejected. We need not rehearse this rehash.

Second, the defendants now seek to raise the political question doctrine, a legal theory they raised only as to the apportionment claim in the 172 pages of their prejudgment briefing on the merits before us.[1] We consider the defendants knowingly to have waived the political question doctrine as to the overseas census claims. Even if the doctrine had any applicability to this case—a proposition which our discussion in connection with the apportionment claim should make clear we view as without merit—the strategic choice to withhold its assertion as to certain claims while

[1] Other, less obviously new, legal arguments are introduced for the first time in the defendants' postjudgment submissions as well. For example, the argument that the Census Act itself bars judicial review of apportionment counts because of the limited time scheduled for their submission to the President and the Congress was not made to us before judgment. Even if we were to consider the defendants free to make such new arguments after judgment—which we do not—we find nothing in these new contentions which suggests a need to reconsider our opinion.

vigorously asserting it as to another will not be rewarded by belated recognition on a postjudgment motion seeking to avoid the consequences of that considered choice.

Third, the defendants attempt to insinuate into the record new factual contentions they did not choose to include in the extensive Administrative Record they assembled nor in the lengthy stipulation of facts they prepared with plaintiffs. This attempt to reopen the record appears to be a clear breach of the agreements between the parties in shaping the case for resolution by summary judgment before us. It is certainly in derogation of the case management understandings the defendants induced at the scheduling conferences. We do not countenance such gamesmanship. The new declarations will be stricken. We offer certain brief comments on the attempted assertion of these new factual grounds to illustrate why, even considering the declarations, we find the defendants' motion without merit.

The defendants purport to rely upon case law which permits remand to an administrative agency when the record of decision it produces provides an inadequate basis for judicial review. However, the record here was not inadequate. It was developed fully and contemporaneously. It was supplemented by carefully negotiated stipulations of fact between the parties. The defendants' assertion to the contrary notwithstanding, none of the "critical aspects of the administrative record" were "ignored" in our consideration of defendants' actions. *Defendants' Reconsideration Memo* at 1. The problem from the defendants' prospective is that the existing record simply does not support the conclusion the Secretary of Commerce reached. Under the guise of a newly discovered need to develop the record more favorably

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to their contentions, the defendants now seek to breach a cardinal principle of judicial review of agency action: "the courts may not accept appellate counsel's *post hoc* rationalizations for agency action." *Motor Vehicle Manufacturers Ass'n. v. State Farm Mutual Ins. Co.*, 463 U.S. 29, 50 (1983). To do otherwise is to invite what the defendants offer here, transformation of an administrative record into a recent contrivance.

The defendants' efforts at hopeful reconstruction of their administrative record proceed on several levels. One is semantic. Thus the defendants now argue "[t]he fact that 'home of record' data were considered to be of 'unknown reliability' does not suggest that the data were therefore 'unreliable.'" *Defendants' Reconsideration Memo* at 15. The distinction the defendants seek to draw is, at the very least, elusive.

The defendants also seek to ignore the existing evidence of their own conclusions regarding the home of record data. Thus, in his reecntly filed declaration Associate Census Bureau Director Jones asserts that "the Bureau never concluded that the 'home of record data' did not provide a rational means of allocating overseas personnel among the states." Jones Dec. at ¶ 4. This assertion is rebutted by the Bureau's 1987 policy paper concerning the 1990 census, which specifically concluded that counts drawn from existing records of the Department of Defense "will not be included in the official totals for the states since the assignment to geography would be *arbitrary* and operationally difficult." A.R. at 224 (emphasis supplied).

Mr. Jones now asserts that "there are no other data available [than home of record data] that would be better predictors of where military personnel would

return upon leaving the service." Jones Dec. at ¶ 8. The short answer to this is that achieving preeminence in a comparison among inadequate data does not alchemize the least inadequate data into acceptable data. This point was made by the Defense Department's Deputy Assistant Secretary for Resource Management and Support when he told Congress in the fall of 1989 that "[a]fter investigating all data elements on personnel records which indicate some form of state affiliation, the DoD decided that none of them meets a reasonable test of validity for apportionment purposes." A.R. at 578.

In the final analysis the defendants rest on the proposition that "use of the home of record data results in a distribution of the population among the states that mirrors the distribution of the U. S. population far more closely than either last duty station or legal residence data." Jones Dec. at ¶ 8. This assertion appears to be a contention that it did not make any difference that home of record data was used because the data mirrored the general distribution of the United States population.[2] But, of course,

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[2] The defendants' willingness to tolerate inadequate overseas census data appears to rest on the conclusion that the error was *de minimis*. The defendants take the position that

> the fact that a small percentage of one component of the enumeration [the overseas count], (which, in its entirety, comprises approximately .00368 of a national population of approximately 250 million persons) may have been missed or misallocated in the census does not support a conclusion that that component of the enumeration should be discarded altogether for purposes of apportionment.

Defendants' Reconsideration Memo at 4.

To the contrary, however small the "missed or misallocated" component of the census, it was arbitrary and capricious for the defendants to incorporate it in the apportionment count.

it did make such a difference and that difference was sufficient to cause a congressional seat improperly to be allocated in the post 1990 census certifications by the defendants.

The defendants' newly formulated request to remand this record for further development is an effort to succeed in implementing their improper apportionment count by indirection. It is a fact of life that the 1992 election season is underway. If the proper census basis for allocations of seats to the next Congress is to be effected, there must be a timely resolution of this dispute. The defendants were obligated to produce a rational apportionment count on the basis of the state of the record at the end of 1990. The Secretary's decision regarding the overseas census must be evaluated on that basis in a timely fashion. A 1992 remand will not produce a more reliable record. It will only delay the use of a proper apportionment count—without the unreliable overseas component—and afford the opportunity for artful reconstruction tailored to respond to judicial concerns after the fact. We will not indirectly frustrate the plaintiffs' claims by such a pretextual expedient, especially given the agreements and understandings which governed the development of this litigation. We see no reason to relieve the defendants of their obligation to defend this case on the basis upon which they were willing to submit it: the existing administrative record and the stipulation of facts to this court.

The defendants also seek to frustrate and delay plaintiffs' claims directly by seeking a stay pending an anticipated appeal. The defendants' direct request is no more compelling. Employing the familiar four-factor test for evaluating stay requests, *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987), we find defendants' showing inadequate. As our original opinion and this memorandum make clear, we are fully satisfied that defendants have no strong showing of likelihood of success on the merits of any appeal. The balance of harm to the parties arising out of any decision on interlocutory relief weighs heavily in plaintiffs' favor. The plaintiffs have promptly fulfilled the condition we imposed on the receipt of relief. They have today filed the certification called for in paragraph 5 of our Final Decrees and Orders that an eleven-district apportionment plan has been adopted by the General Court of the Commonwealth and approved by the Governor in accordance with the appropriate 1990 apportionment count. Against the plaintiffs' entitlement to proceed with an eleven-district congressional election drawn from an appropriate apportionment count, the defendants themselves can point only to the frustration of their desire to perpetuate error a little longer as a harm to their specific interests. Only one state other than Massachusetts is implicated. And, of course, the frustration of the State of Washington's desire to add an additional congressional seat to her delegation if a stay is denied may also be viewed as a harm to weigh against the harm to the plaintiffs if a stay is entered. But this is harm of a lesser degree. As we noted in our opinion, Mem. Dec. at 88 n.33, Washington State has had an adequate opportunity to make contingency plans for an eight-district delegation in light of the *Montana* litigation. Moreover, denying a stay simply maintains the *status quo*. Massachusetts will continue to have an eleven-district delegation—as it does now—and Washington will continue to have an eight-district delegation—as it does now. The stay sought by the defendants will only disturb the *status quo*.

Finally, with respect to the public interest, we believe that it looks to a fair allocation of congressional seats according to the law. Congressional seats should not be allocated arbitrarily or capriciously. That is precisely the type of evil against which the Administrative Procedure Act was designed to protect. We have no doubt that were this a simple question of error by a traditional administrative agency in the day-to-day work of government there would be no dispute concerning the impropriety of the defendants' administrative action. Administrative misfeasance in the context of congressional apportionment should be treated no differently.

We blind ourselves, however, to the obvious if we do not recognize that the allocation of the House of Representatives is a matter of intense partisan, parochial and political interest. There is always the prospect that faced with such intense interest, traditional work-a-day rules of administrative law will be reformulated. This may be one of those cases which could result in reformulation of the law of judicial review of administrative action

> not by reason of [its] real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests [may] exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well-settled principles of law will bend.

Northern Securities Co. v. United States, 193 U.S. 197, 400-01 (1904) (Holmes, J. dissenting).

Nevertheless, we serve the public interest not by anticipating the possibilities of a bending of the settled law of administrative review but rather by adhering to our duty to apply clearly articulated principles. Those principles admit of no significant likelihood of success for the defendants on appeal. There will be no meaningful harm to the interest of the defendants or others if a stay is denied, but there will be great harm to the plaintiffs if our orders are stayed directly or indirectly. Under the circumstances, we believe it in the public interest to deny the defendants' motion to stay.

Accordingly, for the reasons set forth more fully above, we hereby

ALLOW Plaintiffs' Motion to Strike Post-Judgment "Declarations"; and

DENY Defendants' Motion for Reconsideration and Motion For Stay.

By the Court

/s/ Hadley Blake
Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 91-11234-WD

COMMONWEALTH OF MASSACHUSETTS, EDWARD F. BERLIN AND KAREN J. KEPLER, PLAINTIFFS,

v.

ROBERT MOSBACHER, AS SECRETARY OF THE UNITED STATES DEPARTMENT OF COMMERCE; MICHAEL DARBY, AS UNDERSECRETARY OF ECONOMIC AFFAIRS OF THE UNITED STATES DEPARTMENT OF COMMERCE; THE BUREAU OF THE CENSUS; BARBARA BRYANT, AS DIRECTOR OF THE BUREAU OF THE CENSUS; GEORGE HERBERT WALKER BUSH, AS PRESIDENT OF THE UNITED STATES; AND DONNALD K. ANDERSON, AS CLERK OF THE UNITED STATES HOUSE OF REPRESENTATIVES, DEFENDANTS.

FINAL DECREES AND ORDERS

February 20, 1992

In accordance with the Memorandum issued this day, it is hereby ORDERED, ADJUDGED and DECREED:

1. That 2 U.S.C. § 2(a)(a), insofar as it requires apportionment of seats in the House of Representatives among the states by the method known as equal proportions, is not in violation of the United States Constitution;

2. That the administrative practice of the Executive Branch Defendants in counting overseas federal employees in the 1990 census for the purpose of apportioning seats in the United States House of Representatives among the states was arbitrary and capricious and an abuse of discretion in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), and that consequently the use of the overseas census counts by the defendants in the certification of state entitlements to seats in the House of Representatives was improper;

3. That the Executive Branch Defendants shall submit to defendant Anderson on or before March 31, 1992, a statement showing the number of Representatives to which each state would be entitled as a result of the 1990 decennial census under 2 U.S.C. § 2(a)(a), without inclusion of the overseas census counts in the apportionment count;

4. That defendant Anderson, as he is the Clerk of the United States House of Representatives, shall on or before April 10, 1992, send the executive of each state a recertification of the number of Representatives to which such state is entitled in accordance with paragraph 3 of this Order;

5. That the plaintiff Commonwealth of Massachusetts shall, on or before March 30, 1992, submit a certification to be docketed in this action affirming that there has been prepared a plan-adopted by the General Court of the Commonwealth and approved by the Governor—for the redistricting of eleven Congressional seats in Massachusetts, in accordance with the 1990 decennial census, without inclusion of the overseas census counts;

6. That the failure of the Commonwealth of Massachusetts to certify the adoption and approval of

the plan called for by paragraph 5 of this Order on or before March 30, 1992 will relieve the defendants of their obligations under paragraphs 3 and 4 of this Order.

/s/ Hugh H. Bownes
HUGH H. BOWNES
Senior United States Circuit Judge

/s/ Francis J. Boyle
FRANCIS J. BOYLE
United States District Judge

/s/ Douglas P. Woodlock
DOUGLAS P. WOODLOCK
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 91-11234-WD

COMMONWEALTH OF MASSACHUSETTS, EDWARD F. BERLIN and KAREN J. KEPLER, PLAINTIFFS,

v.

BARBARA HACKMAN FRANKLIN, as Secretary of the United States Department of Commerce; MARK W. PLANT, as Acting Undersecretary for Economic Affairs of the United States Department of Commerce;[1] THE BUREAU OF THE CENSUS; BARBARA EVERITT BRYANT, as Director of the Bureau of the Census; GEORGE HERBERT WALKER BUSH, as President of the United States; and DONNALD K. ANDERSON, as Clerk of the United States House of Representatives, DEFENDANTS.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Barbara Hackman Franklin, Mark W. Plant, the Bureau of the Census, Barbara Everitt Bryant and George Herbert Walker Bush, hereby appeal to the Supreme Court of the

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[1] Barbara Hackman Franklin is substituted for Robert Mosbacher and Mark W. Plant is substituted for Michael Darby in accordance with Federal Rule of Civil Procedure 25(d).

United States from the Final Decrees and Orders, dated February 20, 1992, and the orders of March 13, 1992, of the three-judge court. This appeal is taken pursuant to 28 U.S.C. § 1253.

Respectfully submitted,

STUART M. GERSON
Assistant Attorney General

WAYNE A. BUDD
United States Attorney

JUDITH S. YOGMAN
Associate U.S. Attorney

DENNIS G. LINDER
Director
Federal Programs Branch
Civil Division

/s/ Sandra M. Schraibman
SANDRA M. SCHRAIBMAN

/s/ Susan Korytkowski
SUSAN KORYTKOWSKI

/s/ Mark B. Stern
MARK B. STERN

Attorneys, Department of Justice
Civil Division, Room 1042
Federal Programs Branch
901 E Street, N.W.
Washington, D.C. 20530
Telephone (202) 514-4504

Attorneys for Executive Branch Defendants

APPENDIX E

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article I, Section 2, Clauses 1, 2 and 3 of the United States Constitution provide:

> The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.
>
> No person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.
>
> Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the

State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

2. Article I, Section 8, Clause 18 of the United States Constitution provides:

SECTION 8. The Congress shall have Power

* * * * *

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

3. Sections 2 and 5 of the Fourteenth Amendment to the United States Constitution provide:

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion

which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

* * * * *

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

4. 2 U.S.C. 2a provides:

Reapportionment of Representatives; time and manner; existing decennial census figures as basis; statement by President; duty of clerk

(a) On the first day, or within one week thereafter, of the first regular session of the Eighty-second Congress and of each fifth Congress thereafter, the President shall transmit to the Congress a statement showing the whole number of persons in each State, excluding Indians not taxed, as ascertained under the seventeenth and each subsequent decennial census of the population, and the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives by the method known as the method of equal proportions, no State to receive less than one Member.

(b) Each State shall be entitled, in the Eighty-third Congress and in each Congress thereafter until the taking effect of a reapportionment under this section or subsequent statute, to the number of Representatives shown in the statement required by subsection (a) of this section, no State to receive less than one Member. It shall be the duty of the Clerk of the House of Representatives, within fifteen calendar days after the

receipt of such statement, to send to the executive of each State a certificate of the number of Representatives to which such State is entitled under this section. In case of a vacancy in the office of Clerk, or of his absence or inability to discharge this duty, then such duty shall devolve upon the Sergeant at Arms of the House of Representatives; and in case of vacancies in the offices of both the Clerk and the Sergeant at Arms, or the absence or inability of both to act, such duty shall devolve upon the Doorkeeper of the House of Representatives.

(c) Until a State is redistricted in the manner provided by the law thereof after any apportionment, the Representatives to which such State is entitled under such apportionment shall be elected in the following manner: (1) If there is no change in the number of Representatives, they shall be elected from the districts then prescribed by the law of such State, and if any of them are elected from the State at large they shall continue to be so elected; (2) if there is an increase in the number of Representatives, such additional Representative or Representatives shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State; (3) if there is a decrease in the number of Representatives but the number of districts in such State is equal to such decreased number of Representatives, they shall be elected from the districts then prescribed by the law of such State; (4) if there is a decrease in the number of Representatives but the number of districts in such State is less than such number of Representatives, the number of Represent-

atives by which such number of districts is exceeded shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State; or (5) if there is a decrease in the number of Representatives and the number of districts in such State exceeds such decreased number of Representatives, they shall be elected from the State at large.

5. 13 U.S.C. 141(a) and (b) provide:

Population and other census information

(a) The Secretary shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the "decennial census date", in such form and content as he may determine, including the use of sampling procedures and special surveys. In connection with any such census, the Secretary is authorized to obtain such other census information as necessary.

(b) The tabulation of total population by States under subsection (a) of this section as required for the apportionment of Representatives in Congress among the several States shall be completed within 9 months after the census date and reported by the Secretary to the President of the United States.

* * * * *

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

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No. 91-1502

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

BARBARA FRANKLIN, SECRETARY OF COMMERCE, ET AL., APPELLANTS

v.

COMMONWEALTH OF MASSACHUSETTS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

LODGING

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

COMMONWEALTH OF MASSACHUSETTS, EDWARD F. BERLIN and KAREN J. KEPLER, Plaintiffs, v. ROBERT MOSBACHER, as Secretary of the United States Department of Commerce; MICHAEL DARBY, as Undersecretary of Economic Affairs of the United States Department of Commerce; THE BUREAU OF THE CENSUS; BARBARA BRYANT, as Director of the Bureau of the Census; GEORGE HERBERT WALKER BUSH, as President of the United States; and DONNALD K. ANDERSON, as Clerk of the United States House of Representatives Defendants.	)	Civil Action No: 91-11234 WD

STIPULATION OF FACTS

The parties stipulate, for purposes of this litigation only, that the facts set forth in these stipulations are true. By so stipulating, the parties do not admit that anything set forth herein, or in any document referenced in or attached to this Stipulation, is relevant or material to any issue in this case. As to the documents attached as Exhibits to this Stipulation or referenced in the Administrative Record, the parties stipulate that those documents are true and authentic copies of the originals, were authored by the agencies and/or persons whose names appear thereon, and are what they purport to be.

COUNTING FEDERAL OVERSEAS EMPLOYEES

1. The federal decennial census is conducted pursuant to the requirement imposed by the Fourteenth Amendment and Article I, Section 2, Clause 3 of the U.S. Constitution to enumerate "the whole number of persons in each state" as the basis for apportionment of seats in the U.S. House of Representatives.

2. Subject to the requirements of Article I, Section 2, Clause 3, and the 14th Amendment to the U.S. Constitution, Congress may enact legislation governing the rules and practices of the Census Bureau in conducting the decennial census. Through 13 U.S.C. §§ 141 et seq., Congress has delegated responsibility for conducting the census to the Secretary of Commerce. In turn, the Secretary of Commerce has delegated that responsibility to the Director of the Bureau of the Census.

3. To enumerate the population of the United States for Congressional apportionment, the Census Bureau establishes enumeration rules ("who" should be counted) and residence rules ("where" should they be counted) to deal with the various situations that will or may prevail at the time of the census. Attached as Exhibit A is a true copy of a Census Bureau

memorandum that states the enumeration and residence rules to be used for the 1990 census.

4. Since the first census in 1790, the Census Bureau has used the concept of "usual residence" as the guiding principle in formulating enumeration and residence rules for the conduct of each census.

5. The "usual residence" concept, as applied by the Census Bureau, provides that persons should be included in the census counts at the place where they are living and sleeping most of the time, as of the date that the census is taken.

6. In conducting the 1990 census and previous censuses, the Census Bureau provided instructions to respondents and census takers that described the concept of "usual residence," as well as other enumeration and residence rules, to determine who should or should not be included on the census questionnaire for particular living quarters.

7. While completing a questionnaire or answering questions from census takers, respondents, rather than the Census Bureau, determine their "usual residence." This information is used for purposes of congressional apportionment. Respondents also interpret the enumeration and residence rules supplied on the questionnaire or by the census taker in determining who they should report as being residents of a particular living quarters. Attached as Exhibit B are true copies of the instructions provided to respondents with the 1990 census

questionnaire, and residence rules provided to census enumerators for the 1990 census.

8. In an August 15, 1983 intra-agency memorandum regarding residence rules issues for the 1990 Census, the Census Bureau defined "usual residence" operationally as where a person spends four nights a week, or more than 182 days in the calendar year. The instructions to the Official 1990 U.S. Census form define "usual residence" as the place where the person lives and sleeps most of the time. Under literal application of these definitions in 1990, the "usual residence" of military personnel stationed overseas is their overseas post.

9. During the 1990 census, the Census Bureau followed the procedure described above to count and apportion persons who were residing within the fifty states on the census date, including federal civilian and military employees and their dependents. The Census Bureau did not determine the usual residence of U.S. military personnel and federal civilian employees and their dependents stationed overseas (hereinafter "overseas federal employees") using the enumeration and residence rules set forth in Exhibit A or the questionnaire set forth in Exhibit B. Instead, in 1990 the Bureau apportioned overseas federal employees to states following other procedures that are described below.

10. For the 1990 and prior censuses, with the exception listed below, the Bureau's enumeration and residence rules stated that Federal military personnel stationed in the United

States and its territories were to be counted at the living quarters where they were usually living and sleeping at the time of the census. For example, persons stationed on military bases within the United States were counted at their living quarters whether on or off base. The same enumeration and residence rules stated that such military personnel should not be included in living quarters where they might be considered household members (such as a place they had lived before entering military service or where they intended to live after leaving military service), if they were living elsewhere while serving in the military. Except as described below this also was true of military personnel residing (usually living and sleeping) outside the United States at the time of the 1990 and prior censuses. For the 1900 census, the instructions to enumerators stated as follows: "If a soldier, sailor, or marine (officer or enlisted man), or civilian employee in the service of the United States at a station at home or abroad, is a member of a family living in your district, he should be enumerated as a member of that family, even though he may be absent on duty at the time of the enumeration."

11. With the exception of the instruction for the 1900 census set forth immediately above, the instructions set forth in the preceding paragraph were not used to enumerate sailors. The 1990 instructions for sailors appear at pages 7-8 and 14-17 of Exhibit A to this Stipulation. That Exhibit also describes

other instructions that have been used to enumerate sailors in prior censuses.

12. For the 1990 and prior censuses, except 1900, the Bureau's enumeration and residence rules stated that overseas federal employees, who might be considered a household member for a particular living quarters, but who were residing (usually living or sleeping) elsewhere at the time of the census, should not be included on the questionnaire for that living quarters. This included any employees residing outside the boundaries of the United States at the time of the census.

13. Overseas federal employees who, as of the census date, were living or stationed in areas which were outside the fifty states but within U.S. sovereignty, for example Puerto Rico, Guam, Virgin Islands and American Samoa, have in past censuses been enumerated in the areas they resided on the census date and not apportioned to any state. In 1900, such employees were enumerated outside the United States, and domestic enumerators also received the instruction set forth in paragraph 10. In 1990, such persons were enumerated and also allocated back to their "home" state for apportionment purposes.

14. During the time period between the ratification of the Constitution and the later ratification of the Fourteenth Amendment, the federal government did not change its definition or its application of the "usual residence rule" in the conduct of censuses.

15. In 1790 and subsequent censuses, enumerators counted indentured servants and slaves for apportionment purposes at the place where they were living as of the census date.

16. During the nineteenth and early twentieth centuries, significant numbers of American soldiers served at duty stations and military posts located outside of any state of the United States. The Department of War also employed civilians at such stations and posts. Some such soldiers and civilians had dependents who lived with them. Such stations and posts were located in the western territories of the United States, Alaska, Hawaii, the Canal Zone, and the Phillipines, as well as other locations.

17. During the nineteenth and twentieth centuries, the War Department maintained records of the states in which its soldiers and employees had lived before entering federal service or considered their permanent homes. Prior to the 1970 census, federal authorities did not use such records to apportion soldiers and employees to particular states.

18. In 1830 and 1840 and in every census since 1900, the Census Bureau has obtained administrative counts of at least a portion of the American population living overseas as of each census date. With the exceptions of 1970 and 1990, the Census Bureau has included such persons, including overseas federal employees, only as part of the total population of the United States, and has not included them in the population of any

state, either for apportionment of congressional seats or for any other tabulation or use of census data.

19. For purposes of apportionment of soldiers to states, the United States government first promulgated a specific written rule in connection with the 1880 census. The rule was: "All soldiers of the U.S. Army, and civilian employees, and other residents at posts or on military reservations will be enumerated in the district in which they reside, equally with other elements of the population."

20. The Census Bureau has not adopted any formal regulation governing the apportionment of overseas federal employees or dependents to particular states.

21. For the 1950 through 1990 censuses, enumeration and residence rules instructed respondents and enumerators that students staying (usually living and sleeping there) at a particular living quarters (at the time of the census) while attending college were to be included on the questionnaire for that living quarters. The same rules instructed respondents and enumerators for living quarters where a student might be considered a household member (such as their family home) not to include them if they were living somewhere else while attending college.

22. For the 1900 through 1940 censuses, respondents and enumerators were instructed that students who were enrolled in colleges and living away from their families on the census date were to be included on the census questionnaire for their

parent's residence rather than the census questionnaire for their college residence.

23. For the 1900 and subsequent censuses, respondents and enumerators were instructed that students in boarding schools and staying (usually living and sleeping there) away from their families on the census date were to be included on the census questionnaire for their parents' residence rather than the census questionnaire for their boarding school residence.

24. For the 1850 and subsequent censuses, the Census Bureau's enumeration and residence rules stated that persons residing (usually living and sleeping) in institutions such as a prison, a mental hospital, or a nursing home at the time of the census were not to be included on census questionnaires completed for addresses where they might be considered a household member, such as the place they had lived before commitment, or where they intended to live after their release from the institution. Instead, these institutionalized persons were counted on census questionnaires at the institutions where they resided.

25. Congress has debated proposals which would have amended the Constitution to exclude illegal aliens from census apportionment counts. No such proposal has been approved by Congress or enacted into law.

26. The 1970 and 1990 censuses are the only times that the Census Bureau has included, as a separate group, counts of overseas Federal employees living in foreign countries on the

census date in the population counts used for purposes of congressional apportionment.

27. In a letter of October 15, 1969 to the Deputy Assistant General Counsel of the Department of Commerce, then-Assistant Attorney General William H. Rehnquist concluded that "the Director of the Census may, in his discretion, validly adopt" a procedure to secure information as to the "home state" of military personnel, civilian employees of the government, and their dependents, and to allocate such persons to their respective home states for inclusion in the population counts used for apportionment. A true copy of that letter appears at pages 14-15 of the Administrative Record.

28. In 1970, during the Vietnam War, the Census Bureau included counts of overseas federal employees for the apportionment of congressional seats (but not for other tabulations or uses of census data). The State of Connecticut lost a seat, and the State of Oklahoma gained a seat, as a result of the inclusion of these persons. The number of congressional seats allocated to the Commonwealth of Massachusetts was not affected by this 1970 decision. Members of the Army, Air Force, and Marine Corps stationed overseas were apportioned based on their home of record. The dependents of the land based military, crews of Navy vessels assigned to the 6th and 7th fleets, and overseas Federal civilian employees and their dependents were self-enumerated using the Overseas Census Report, a form requesting their "home state."

29. A July 1976 report by the federal Advisory Commission of Intergovernmental Relations showed that some military personnel selected as their "home state" one with low or no income taxes rather than their "true" home state. In Congressional testimony in September 1976 and in Census Bureau documents prior to the 1980 Census, officials from the Census Bureau stated that "data on the home state listed in the personnel records of American military personnel stationed overseas are of unknown reliability." Officials from the Census Bureau testified in September 1976 that for this reason, and because the number of Americans abroad had been cut in half, from 1.6 million in 1970 to 930,000 as of September 30, 1975, the Bureau had determined not to include overseas military in the apportionment population. See A.R. 49-65.

30. In the 1980 census, the Census Bureau did not include counts of any overseas federal employees for the apportionment of congressional seats.

31. Census Bureau began planning for the 1990 census in the Fall of 1983. As of October 15, 1987, the Census Bureau had decided not to include any of the overseas population in the census counts used for apportionment.

32. The document that appears on pages 213-36 of the Administrative Record is a Policy Paper dated April 7, 1987, prepared by the Director of the Bureau of the Census concerning Enumeration and Residence Rules for the 1990 Census. That

Policy Paper states the official policy of the Census Bureau as of the date it was created.

33. During the 100th Congress, several bills were introduced that would have required the inclusion of overseas military personnel in census counts for apportionment purposes. These bills included H.R. 3814, H.R. 4234, H.R. 3815, H.R. 4720, and S. 2103. See A.R. 367, 296-97, 284-85, 414-19, 291-92. Both H.R. 3814 and H.R. 4234 also would have required the exclusion of illegal aliens from census counts used for apportionment. The House Committee on Post Office and Civil Service which had oversight responsibility for the Census Bureau, passed H.R. 4720 on September 14, 1988. The full House considered H.R. 4720 on September 28, 1988, but a majority (317 to 93, with 21 not voting) voted not to suspend rules, and thus did not pass the bill. The 100th Congress did not enact any legislation addressing the question of whether or not overseas federal employees should be apportioned to states in the census, or how any such apportionment should be done.

34. In a June 8, 1988 letter to the Chairman of the Committee on Post Office and Civil Service, the General Counsel of the Department of Commerce stated that the Department opposed the enactment of H.R. 4720 (A.R. 414-19). A true copy of that letter which stated the official views of the Department on H.R. 4720, appears at pages 365-66 of the Administrative Record.

35. The letter attached as Exhibit C is a true copy of a letter dated April 14, 1988 from the U.S. Department of Justice to James Miller, Director of the U.S. Office of Management and Budget.

36. In two August 11, 1988 letters concerning the enumeration of overseas personnel, the Census Bureau stated that "according to the usual residence concept, the 1990 census counts for apportionment will not include military personnel living outside the United States. . . on census day."

37. During the 101st Congress, the following bills were introduced that would have required the inclusion of overseas military in the counts used for congressional apportionment: H.R. 1468, H.R. 2661, H.R. 3016 and S. 290. See A.R. 474-79, 491-92, 506-09, 839-40, 459-60, 845-46. H.R. 1468 and H.R. 3016 would also have required the inclusion of overseas civilian employees of the United States in apportionment counts. Two of those bills, H.R. 1468 and H.R. 2661, also required exclusion of illegal aliens from the counts used for apportionment. In addition, the following bills were introduced requiring the exclusion of illegal aliens from the counts used for apportionment: H.C.R. 195, H.J.R. 199, H.R. 744, S. 848. See A.R. 775-76, 472-73, 461-63, 484-86. None of the bills listed above passed either the House or the Senate. The 101st Congress did not enact any legislation addressing the question of whether or not overseas federal employees should be apportioned to states in the census.

38. On July 31, 1989, while the 101st Congress was in session, Secretary of Commerce Robert Mosbacher decided to include counts of overseas Federal employees in the 1990 census count for purposes of congressional apportionment. A true and complete copy of a document showing the Secretary of Commerce's statement of reasons for the decision appears at pages 511-12 of the Administrative Record. On August 1, 1989, the Department of Commerce publicly announced this decision. A true copy of the press release issued by the Department at that time appears at page 735 of the Administrative Record.

39. At a September 7, 1989 congressional committee hearing on H.R. 2661, Census Bureau Deputy Director C.L. Kincannon announced that the Census Bureau would include counts of overseas Federal employees for apportionment purposes. A true copy of the September 7, 1989 Kincannon testimony appears at pages 758-74 of the Administrative Record.

40. A true copy of a letter sent in March 1990 from the Secretary of Commerce to the Secretary of Defense appears at 834 of the Administrative Record.

41. A true copy of a letter sent in May 1990 from the Director of the Census Bureau to Congressman William Ford appears at 832-3 of the Administrative Record.

42. As a result of the Census Bureau's decision to include overseas federal employees in census counts for purposes of congressional apportionment in the 1990 census, the Commonwealth of Massachusetts will lose one seat (relative to

the previous apportionment in 1980 and to the number of seats it would have received if overseas federal employees had not been apportioned to states) in the House of Representatives. If overseas federal employees were excluded from apportionment counts, the State of Washington would lose one seat in the House, as compared to its apportionment if such employees were included.

43. In discussions with the Census Bureau and members of Congress concerning the 1990 census, the Department of Defense discouraged the use of "home of record" as the criterion for apportioning military personnel to specific states because: 1) its personnel records had a high rate of error with respect to "home of record;" 2) home of record may be a place where a person has not lived for many years and, in some cases, may be a place where the person has never lived; and 3) home of record information was missing for 7 to 10% of the active force and was entirely unavailable for civilian DOD personnel.

44. In Congressional testimony in 1989, DOD officials testified that "none of the data elements contained in DOD personnel records (i.e., home of record, tax residence, voting residence) meets a reasonable test of validity for apportionment purposes."

45. In 1989, prior to the Census Bureau's decision to include overseas federal employees in the apportionment population, the Department of Defense planned to do an actual enumeration of its overseas employees. DOD stated to the

Bureau that it intended to survey its military and civilian employees, either in person or by questionnaires, to determine which state, if any, they considered their permanent home. The DOD's stated intent to conduct an actual enumeration of its employees was a significant reason for the Secretary of Commerce's July 31, 1989 decision to change the Department's prior policy and to include DOD's overseas employees for apportionment purposes. A memorandum approved by the Secretary stated that he also based this decision on the "growing bipartisan Congressional support" for including the overseas military in the apportionment counts and on then-Assistant Attorney General Rehnquist's legal opinion on the issue.

46. In December 1989, DOD cancelled its plans to do an actual enumeration of its employees for the 1990 census apportionment due to a lack of funds.

47. Following the cancellation of its planned enumeration, DOD stated to the Census Bureau that it could provide data on the "last six months" of residence in the United States that were superior to its data on "home of record." For this reason, and because at that time the Census Bureau believed that the "last six months" data was more closely compatible with the concept of "usual residence," than the data elements contained in the DOD's personnel records, the Census Bureau determined as of March 29, 1990, that it would base the apportionment of overseas military employees in the 1990 census upon the "last six months" rule rather than home of record.

48. Between June 19, 1990, and July 10, 1990, DOD informed the Census Bureau that it did not have the ability to assemble data on the last U.S. address of six months' duration for its overseas employees.

49. On May 23, 1990, two bills were introduced in Congress concerning the method by which members of the overseas military would be apportioned to their "home states." H.R. 4903 and S. 2675 both would have required the Census Bureau to apportion members to their home states using the member's "home of record." On June 26, 1990, the House passed H.R. 4903. The 101st Congress did not enact any legislation addressing the question of how such apportionment should be done.

50. On or about July 10, 1990, after DOD had informed the Census Bureau that it could not provide data on last U.S. address of six months' duration, the Census Bureau decided that it would apportion DOD's overseas employees to particular states based on their "home of record" as listed in DOD records.

51. After informing the Census Bureau that it could not provide data on its members' last U.S. residence of six months' duration, DOD identified three alternative means for determining the home state affiliation of its overseas military personnel: legal residence, home of record, and last duty station. A.R. 921. In a July 23, 1990 letter to Representative Thomas Sawyer, Michael Darby, Under Secretary for Economic Affairs, stated the Commerce Department's reasons for its decision to apportion overseas federal employees based

on home of record. The letter that appears at A.R. 925 is a true copy of the July 23, 1990 Darby letter. See A.R. 925.

52. In an August 1, 1989 press release, the Census Bureau stated that the DOD estimated that it had 1.2 to 1.6 million overseas employees.

53. The actual number of overseas federal employees included in the 1990 census apportionment count was 922,819. 919,810 of these were apportioned to states; the remainder were apportioned to the District of Columbia. The number of overseas employees attributed to the DOD was 901,880.

54. In the February 29, 1991 Final Status Report on the Overseas Count Project, the Census Bureau stated "that the DOD total count of 901,880 overseas personnel/dependents was less than estimated because: 1) the DOD estimated range was for a period when the levels of military deployments overseas were higher than on Census day, 2) the DOD estimated range included U.S. Navy personnel who, in accordance with the census rules of residence, were not considered to be overseas and were covered by census procedure that applied to the U.S. resident population, and 3) given the 20-percent response to the civilian survey, overseas civilians and dependents were missing from DOD's final submission of counts to the Census Bureau."

55. Of the 40 federal agencies that were invited to submit counts of overseas employees for apportionment purposes in the 1990 census, 30 actually submitted such counts. Of the 30 reporting, 20 included dependents and 10 did not. Four of the

reporting agencies could not provide a home state for all of their overseas employees.

56. In the 1990 census, overseas military personnel and their dependents were assigned to states for purposes of apportionment based on home of record. If the Department of Defense ("DOD") did not have a home of record for a member of the military, the member's, and his or her dependent's, home state was determined on the basis of the member's legal residence (with last duty station being used if legal residence was not available). Pursuant to the above procedures, there remained 1,846 military personnel and dependents who were counted but were not apportioned to states because their home state could not be determined.

57. Because the DOD did not have home of record information available for its civilian employees for the 1990 Census, it sought to determine the home states of civilian employees stationed overseas through their responses to a questionnaire circulated by DOD. The DOD sent questionnaires to 61,205 of its overseas civilian employees. The DOD did not send questionnaires to dependents of its civilian employees; rather, those persons were intended to be assigned according to the employees' responses. The DOD received completed questionnaires from approximately twenty percent of all such civilian employees. Those employees who did not respond, and their dependents, were not assigned to any state for apportionment purposes. Employees who did respond were asked

to identify a home of record, legal residence, and last duty station. As with military personnel records, home of record was used first, then legal residence, and finally last duty station. Other federal agencies were instructed to determine the home states of their employees, and their dependents, stationed overseas, based solely on their administrative records.

58. In conducting the 1990 census, the Census Bureau did not require or verify that federal overseas employees and their dependents were apportioned to the state in which they had elected to vote. Nor did the Census Bureau require or verify that individuals in the United States were apportioned to the state in which they had elected to vote.

APPORTIONMENT FORMULAS

59. The Census Bureau conducts the decennial census to determine the whole number of persons in each state, and then calculates the apportionment of seats in the U.S. House of Representatives among the states. The calculation of the apportionment is based upon the method of equal proportions, also known as the Hill-Huntington method (hereinafter the "Hill method"), as required by Title 2, United States Code, Sections 2a(a), 2b. These results then are conveyed to the President through the Secretary of Commerce. The President then transmits to the United States Congress (the Congress) a statement of the whole number of persons in each state and the

number of representatives in the Congress to which each state is entitled, as ascertained under the decennial census. The Clerk of the U.S. House of Representatives (the House) then notifies each state (via a Certificate of Entitlement) of the number of representatives in Congress to which it is entitled.

60. The Congress has legislated four methods for apportionment since the first census of 1790. In 1941, Congress codified in Title 2 of the United States Code laws that govern the method currently used and the process for apportionment. Article I, Section 2 of the Constitution requires that Congress apportion House seats according to population, but does not allow for fractional House seats nor districts which cross state lines. Congress must apply some method to round off each state's otherwise fractional number of seats.

61. In 1792 Congress legislated use of the Jefferson method (also known as the method of greatest divisors) of apportionment after the first census in 1790. This method was used after each subsequent census through 1830. Under this method, the population of each state was divided by a fixed ratio (a pre-specified number of persons per representative) and the resulting integer was the size of the state's delegation, regardless of the size of the fractional remainder. For example, if the ratio for a particular state was 3.4, the state would receive 3 representatives. If the ratio was 3.9, the state still would receive 3

representatives. This method did not require that the size of the House, i.e., the total number of representatives, be a fixed number (in fact, the method would have to be modified for use with a fixed House size). Instead, the size of the House was the sum of the number of representatives given to each state using the above method. The size of the House grew over time based on apportionments following the 1790, 1800, 1810, 1820, and 1830 censuses.

62. Following the 1840 census, the Congress legislated use of the Webster method (also known as the method of major fractions (hereinafter "Webster method")) for the apportionment calculation. As then employed, with no mandate that the size of the House be fixed, it used a fixed ratio (of a pre-specified number of persons per representative), but an additional seat was assigned for each fractional remainder greater than one-half. For example, if the ratio for a state was 3.2, the state received 3 representatives. But if the ratio was 3.9 (or anything greater than 3.5, but less than 4.5), the state received 4 representatives. This method also did not require that the size of the House be a fixed number (and in fact would need to be modified for use with a fixed House size); the total number of representatives again was the sum of the representatives allocated to each state under this method.

63. Congress legislated use of the Vinton method (also known as the Hamilton method) for apportionment following the

censuses of 1850 through 1900. It utilized a fixed number of representatives. In this method, the apportionment population of the United States was divided by the fixed size of the House to derive a national-average-size Congressional district. The population of each state was then divided by this national-average-size Congressional district to obtain an exact quota of representatives. (This is known as the "House seat quota"). One representative was assigned to each state whose exact quota was less than one (to meet the Constitutional requirement that each state receive at least one representative). The other states (having quotas greater than or equal to 1.0) were assigned a seat for each whole number of their respective quotas, and any remaining seats were assigned on the basis of the highest fractional remainders for those states. Under this method, it is mathematically possible that a state could receive fewer seats if the size of the House were increased and the population of all states remained constant. This anomaly is known as the "Alabama paradox", because it was observed that for the 1880 census, Alabama would receive eight seats with a House size of 299 and seven seats with a House size of 300 by the use of the Vinton method.

64. In 1910, Congress legislated use of the Webster, or major fractions, method. Congress also fixed House membership at 433, with the proviso that "if the Territories of Arizona and New Mexico shall become States in the Union before the apportionment of Representatives under the next decennial

census they shall have one Representative each.... " 37 Stat. 14 (1911). Both Arizona and New Mexico became states in 1912 and House membership has been 435 since that time, except when it was increased temporarily when Alaska and Hawaii became states in 1959.

65. Congress could not decide on an apportionment plan following the 1920 census, but in 1929 passed a law that made reapportionment automatic, using whatever method was used for the previous apportionment in the event the Congress did not agree on another method.

66. Using results of the 1930 census, both the Hill method and the Webster method produced the same apportionment. The Congress did not legislate any method of apportionment, so as a result of the 1929 legislation, the apportionment for 1930 was automatic and was based upon the Webster method (because it had been used for the previous (1910) apportionment).

67. In January 1941, the President transmitted to Congress apportionments based upon both the Hill method and the Webster method. The methods produced the same apportionment except for two states, Arkansas and Michigan. The Hill method resulted in an additional seat for Arkansas; the Webster method resulted in an additional seat for Michigan. Congress debated the apportionment methodologies and enacted legislation adopting the Hill method, by a vote in which every Democrat (except those from Michigan) voted for, and every Republican voted against, the bill. No legislation affecting the method of

apportionment has been passed by Congress since 1941. As a result, the Hill method has been used for each subsequent apportionment, including 1990.

68. One of the products of the lengthy debates in the Congress regarding apportionment following the 1920 census, was the Congress' commissioning the National Academy of Sciences (NAS) to prepare a report "regarding the mathematical aspects of the problem of reapportionment". The report of the Committee on Apportionment discussed five methods "now known which are unambiguous (that is, lead to a workable solution)": smallest divisors (Adams method), harmonic means (Dean method), equal proportions (Hill method), major fractions (Webster method), and greatest divisors (Jefferson method). With a fixed House size, apportionments under these five methods are calculated using formulas involving each state's apportionment population and a divisor which determines each state's priority for its next seat (after one seat is assigned to each state). The divisors for the different formulas are functions of the number of seats already assigned to a given state which vary according to specific goals that each method is designed to achieve.

69. The report of the National Academy of Sciences committee, submitted to Congress in 1929, stated that the committee preferred the Hill method. The report analyzed five methods: Adams, Dean, Hill, Webster and Jefferson. It listed them in the order in which they "favor the larger States as

compared with the methods which precede it" (the Adams method favoring the small states the most, Jefferson's favoring the large states the most, and the Hill method listed third among the five); and stated that Hill's method "occupies mathematically a neutral position with respect to emphasis on larger and smaller states". (Report of the National Academy of Sciences Committee On Apportionment from the Annual Report of the National Academy of Sciences, Fiscal Year 1928-29, pp. 20-23).

70. In 1948, Congress asked the National Academy of Sciences to re-examine the various apportionment methods. An NAS committee concurred with the conclusion of the 1929 report.

71. Following both the 1970 and 1980 decennial censuses, Congress conducted hearings regarding methods of Congressional apportionment.

72. The apportionment method used in 1990, pursuant to Congressional legislation in force since 1941, was the Hill method. Using this method, Massachusetts received 10 seats under the apportionment based on the 1990 census.

73. If the Webster method for apportionment based on the 1990 census had been used (either excluding or including the counts of overseas military, other Federal employees, and dependents), Massachusetts would have received 11 seats. The Webster method may be applied as follows: a) A divisor would be found by dividing the apportionment population by 435 (the

total number of seats) to produce the national average size district. b) Each state's apportionment population would then be divided by the above divisor to obtain a quotient consisting of a whole number (possibly zero) and a fraction. c) If a state's quotient was less than 1.0, it would be rounded up to 1.0 no matter how small the fraction. d) For all other states (those with a quotient greater than or equal to 1.0), fractions less than one-half (0.5) would be rounded down, and fractions greater than one-half (0.5) would be rounded up. e) If the whole numbers resulting from this process summed to 435, the apportionment would be determined and no alteration of the divisor would be needed. f) If too many seats, or too few seats, were allocated by this process, the divisor would be made larger or smaller, respectively, until the total number of whole numbers achieved after rounding was equal to 435.

74. Under the Hill method, 1) each state first receives one Representative, as required under the Constitution. 2) A series of priority values is calculated for each state from which can be determined the state's entitlement to a second Representative, a third, and so on. 3) When the priority values are arranged in sequence (from highest to lowest), they indicate which state should get the 51st Representative, which the 52nd, etc. up through the 435th Representative. 4) The priority values are determined by multiplying the apportionment population of each state by the reciprocal of the geometric mean of the number of seats already assigned, a, and the next

integer, a+1, i.e., 1 divided by the square root of the quantity a(a+1). Alternatively, the apportionment under the Hill method could be obtained as described in paragraph 73 for the Webster method, with one-half (0.5) replaced by the following quantity: the square root a(a+1), minus a, where a is the largest integer not exceeding the state's quotient. For example, if the quotient is 2.7, then the square root of (2X3) minus 2 is approximately 0.449.

75. For quotients greater than one, the Hill rounding point is less than .50. The larger the whole number in a state's quotient, the larger is the Hill rounding point. For example, if a state's quotient falls between 1 and 2, then its Hill rounding point is the square root of 1 X 2, minus 1, which is approximately .414. If a state's quotient falls between 20 and 21, then its Hill rounding point is the square root of 20 X 21, minus 20, which is approximately .494.

76. For quotients greater than one, the Webster rounding point is always .50 exactly.

77. The rounding points in the previous two paragraphs are not always indicative of how the Webster and Hill methods would round the exact quota of a state. For the 1990 census, New York, New Jersey, Massachusetts, and Oklahoma have exact quotas of 31.521, 13.536, 10.532 and 5.516, respectively. The fractional portion of the quota for each of these four states is above the rounding points for both the Webster and the Hill methods. Yet, the Webster method rounds down the exact quota

for each of these states except Massachusetts and the Hill method rounds down the exact quota for each of these states except Oklahoma. Other examples exist in previous censuses where the exact quota is below the rounding point for both Webster and Hill and where either the Hill or Webster methods, or both, round up the exact quota.

78. If the Webster and Hill methods yield different apportionments, then the Hill method, as compared with the Webster method, awards fewer seats to the state or states with larger populations and more seats to the state or states with smaller populations. For example, in 1990, Webster's method gives one more seat to Massachusetts, which has a larger population, rather than to Oklahoma, which is given the extra seat under the Hill method.

79. Exhibit D displays the number of seats which would have been apportioned to Massachusetts based on the 1990 census under seven different apportionment methods. The number of seats that Massachusetts would receive varies depending on the method used and whether the overseas military, Federal employees, and dependents are included (Apportionment Population) or excluded (Resident Population).

80. By dividing the apportionment population by the total number of seats in the House of Representatives (435), a national-average-size congressional district can be obtained.

81. When the national-average-size congressional district is divided into the apportionment population of a state, the

mathematical result is that there is (except for the three smallest states) a whole number of congressional seats plus a fraction of a seat, known as the "House seat quota."

82. All methods of apportionment result in House seat quotas which contain fractions which must be rounded to whole numbers. Any rounding of a House seat quota results in some states receiving more seats than their House seat quota and some states receiving less seats than their House seat quota.

83. Exhibit E displays Massachusetts' House seat quota and the number of seats which would have been apportioned to it under the Hill and Webster methods from 1940 - 1990.

84. According to 1990 decennial census, Massachusetts was the thirteenth most populous state.

85. Massachusetts has been among the thirteen most populous states according to every decennial census since 1940.

86. In every one of the six apportionments from 1940-1990, the total number of seats allotted to the thirteen most populous states by the Hill method was less than the sum of their House seat quotas. In five out the six apportionments from 1940 - 1990, the total number of seats allotted to the thirteen most populous states by the Webster method was less than the sum of their House seat quotas.

87. Under the 1990 Census, Massachusetts will receive twelve electoral votes under the Hill method. Under the Webster method it would receive thirteen electoral votes.

DATED this 1st day of November, 1991.

Dwight Golann
William P. Lee
Steve Berenson
Assistant Attorneys General
One Ashburton Place, Rm. 2019
Boston, MA 02108-1698
(617) 727-2200

John P. Driscoll, Jr.
Edward P. Leibensperger
Neil P. Motenko
Special Assistant Attorneys General
Nutter, McClennen & Fish
One International Place
Boston, MA 02110-2669
(617) 439-2000

Counsel for Plaintiffs

Sandra Schraibman
Mark H. Murphy
Attorneys, Dept. of Justice
Civil Division, Room 3708
10th & Pa. Ave., N.W.
Washington, D.C. 20530
(202) 514-5124

Counsel for Executive Branch Defendants

5348e

UNITED STATES DEPARTMENT OF COMMERCE
Bureau of the Census
Washington, D.C. 20233

OFFICE OF THE DIRECTOR

OCT 15 1987

1990 DECENNIAL CENSUS
POLICY MEMORANDUM NO. 12

MEMORANDUM FOR: Distribution List

From: Charles D. Jones CJ
Associate Director for Decennial Census

Subject: Enumeration and Residence Rules for the 1990 Census

The attached policy paper defines the enumeration and residence rules for the 1990 Decennial Census of Population and Housing (Attachment 1). These rules address the fundamental issues of whom we will enumerate in the 1990 census and where we will enumerate them.

In preparing this policy paper, the Census Bureau reexamined the constitutional, legal, and historical basis for the enumeration and residence rules established for the first decennial census of 1790 and used with minor modifications for all subsequent decennial censuses. In developing this policy paper for 1990, the Census Bureau considered carefully the operational as well as the legal implications of the traditional rules. In December of 1986, the Census Bureau also contracted for a conference of experts--demographers, statisticians, data users, and analysts from both the public and private sectors--and solicited their advice and recommendations for the appropriate enumeration and residence rules for the 1990 census. The attachment also contains the recommendations, some of which the Census Bureau incorporated in the policy paper, from that conference (Attachment 2).

The Census Bureau will incorporate these enumeration and residence rules in the design of forms, procedures, and instructions for the 1990 census.

Attachments

[redacted]
EXHIBIT
A

Attachment 1

ENUMERATION AND RESIDENCE RULES FOR THE 1990 CENSUS
EXECUTIVE SUMMARY

The enumeration and residence rules for the 1990 census provide the basis for determining Who to count in the 1990 census and Where to count them.

The application of enumeration and residence rules must support the goal of obtaining the most accurate counts possible for all geographic areas. To determine these rules, the Census Bureau examined past practices in light of questions about legal residence within the United States as a criterion for enumerating a person, whether to count a person where found or contacted on Census Day or at another location based on established criteria, and the application of these rules to specific population subgroups. The Census Bureau also sought advice from experts outside the Census Bureau as part of this examination of past practices. The results of this examination are the enumeration and residence rules described in this document.

The first census of 1790 established enumeration and residence rules. From the outset, enumeration rules were based on constitutional and statutory requirements. The constitutional basis for the first census required the enumeration of all residents of the United States, not just citizens. The Census Bureau has followed this principle in all subsequent censuses and will follow it for the 1990 census.

Residence rules also were based on statutory requirements. The Census Act of 1790 covering the first decennial census established the concept of usual residence as the guiding principle for determining where to count a person. The usual residence concept requires the Census Bureau to count a person where he or she lives and sleeps most of the time or where he or she considers the usual residence. The Census Bureau has followed this concept, with minor exceptions, in all subsequent censuses and we are adopting it again for the 1990 census.

In selecting the enumeration and residence rules for the 1990 census, the Census Bureau has identified certain groups for whom questions have been raised concerning the application of these rules. These groups and the related enumeration and residence decisions reached for 1990 are as follows:

Enumeration Rules

- The Census Bureau will count American citizens living in the United States on Census Day.
- The Census Bureau will count military personnel and their dependents living overseas by using administrative records but will not include them in the apportionment counts or any other tabulations for states.
- The Census Bureau will count Federal employees and their dependents living overseas by using administrative records but will not include them in the apportionment counts or any other tabulations for states.
- The Census Bureau will not count other American citizens residing overseas who are not members of the Armed Forces or Federal employees, and their dependents. However, the Census Bureau will investigate the feasibility of using administrative records to obtain counts of Americans residing overseas who are employed by multi-national corporations.
- The Census Bureau will count aliens, whether documented or undocumented, residing in the United States on Census Day.
- The Census Bureau will not count foreign diplomats residing on the premises of an embassy or legation on Census Day; the Census Bureau will count those not residing on the premises of an embassy or legation on Census Day.

Residence Rules

- The Census Bureau will count persons away from their usual residence on Census Day at their usual residence.
- The Census Bureau will count persons with multiple residences at the residence that they consider to be their usual residence.
- The Census Bureau will count persons with no usual residence, such as the homeless, where they are found living or staying on or near Census Day.
- The Census Bureau will count persons living away from the parental home at a college or university at their college or university residence.

- The Census Bureau will enumerate persons living away from the parental home at a boarding school as residents of their parental home rather than as residents of their boarding school.
- The Census Bureau will count crews of American-flag maritime vessels at their usual residence, whether on board ship or on shore.
- The Census Bureau will count land-based members of the Armed Forces residing in the United States at their usual residence, whether it is on base or off base.
- The Census Bureau will count crews of military ships not deployed to the U.S. Navy's 6th Fleet (Atlantic) or 7th Fleet (Pacific) and crews of U.S. Coast Guard vessels at their usual residence, whether it is on board ship or on shore. The Census Bureau will treat crews of U.S. Naval ships deployed to the 6th or 7th Fleet as part of the overseas population.
- The Census Bureau will count persons who move on or near Census Day at the place they consider to be their usual residence on Census Day (April 1, 1990).
- The Census Bureau will count migrant workers either at the camp where the Census Bureau contacts them or at their usual residence if they report one.
- The Census Bureau will count persons residing in a long-term care or custody facility as residents of the their institution. The Census Bureau will count persons in a short-term care or custody facility at their usual residence.

ENUMERATION AND RESIDENCE RULES FOR THE 1990 CENSUS

I. INTRODUCTION

The decennial census of the United States is one of the few Federal programs specifically mandated by the Constitution. Article I, Section 2, clause 3 states:

> Representatives . . . shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three-fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct.

(Passage of the Fourteenth Amendment to the Constitution in 1868, following the abolition of slavery, modified Article I, Section 2, clause 3.) This mandate, which the Census Bureau has now fulfilled 20 times, calls for an enumeration of the Nation's inhabitants for apportioning the seats in the House of Representatives.

An ideal census includes every person. Historically, this ideal has not been achievable.[1] As far back as the first census of 1790, President Washington recognized the limitations of a complete count as an achievable goal:

> . . . one thing is certain, our real numbers will exceed, greatly, the official returns of them; because the religious scruples of some would not allow them to give in their lists; the fears of others that it was intended as the foundation of a tax induced them to conceal or diminish theirs, and thro' the indolence of the people, and the negligence of many of the officers, numbers are omitted.[2]

Although no U.S. census has ever achieved a complete or perfect count, the Census Bureau must develop procedures and strategies for the 1990 census that ensure the most accurate counts possible for all geographic areas. The purpose of this paper is to discuss the enumeration and residence rules that the Census Bureau will use to count the population in 1990. Specifically, it will present the decisions for determining who to count and where to count them in the 1990 census.

II. THE GOAL OF THE 1990 CENSUS

The practical goal of the 1990 census is to determine, as of April 1, 1990, the number of people residing in each geographic area of the United States, Puerto Rico, and the outlying areas. As with any goal, one must select strategies that provide the best opportunity for accomplishment. The Census Bureau has examined the various enumeration and residence rules and has identified those that offer the best opportunity to achieve the goal of the 1990 census. Within legal constraints, the Census Bureau has considered carefully the technical, operational and, in some cases, historical criteria in defining the universe of interest and determining how to count that universe. Section III of this paper presents the historical guidance for defining the universe of interest and defines several mutually exclusive subsets of the population. Section IV documents the Census Bureau's plans for counting these subsets of the population in 1990.

III. DEFINING THE UNIVERSE OF INTEREST

Over the years, the specified universe of interest for the census has changed. In the 1790 census, there were exclusions defined by the Constitution and statutory law. For example, the Constitution excluded "Indians not taxed" from the first 15 decennial censuses. The ninth decennial census of 1870 did provide for the enumeration of Indians who were not part of the established tribes and thus were taxed. The 1940 and subsequent censuses included Indians following the U.S. Supreme Court ruling in 1936 that subjected all Indians to Federal taxation. [3]

According to the Constitution, the apportionment counts of the early census excluded two-fifths of "all other persons" (that is, slaves). The provision to include only three-fifths of all slaves in the apportionment count remained until the census of 1870 following passage of the Fourteenth Amendment to the Constitution in 1868. Section 2 of the Fourteenth Amendment states:

> Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.

Thus, except for these two groups, the Census Bureau has attempted to count all persons in each state for apportionment purposes. To achieve that goal, however, we must refine this seemingly simple rule by legal as well as operational considerations.

The planners of the first decennial census in 1790 provided a precedent that in general we have adopted for all subsequent decennial censuses in this country. In deciding where to count a person, we adopted the concept of usual residence to address the constitutional requirements. Simply stated, the concept of usual residence requires counting a person where he or she lives and sleeps most of the time or where he or she considers the usual residence. One should not overlook the importance of this concept as a cornerstone of the Nation's 20 censuses. It has provided a practical and workable solution to the problem of where to count persons. With few exceptions, it is the residence concept that the Census Bureau again is adopting for the bicentennial census of 1990.

In deciding who to count and where to count them, it is useful to list, within the legal parameters, the possibilities or universe of interest. We can divide the possibilities into three major categories: resident citizens, nonresident citizens, and resident noncitizens. The list that follows defines the <u>possible</u> groups to include in the decennial census count for apportionment purposes.

<u>RESIDENT CITIZENS</u>

Resident citizens include all persons who are U.S. citizens, either by birth or by naturalization, whose usual residence is within one of the 50 states. Although some resident citizens live in the District of Columbia, Puerto Rico, or certain of the outlying areas (Guam, the U.S. Virgin Islands, and the Northern Mariana Islands), we do not include them in the apportionment count.

<u>NONRESIDENT CITIZENS</u>

This category includes persons who are citizens of the United States but whose usual residence on Census Day is not within the 50 states.

<u>RESIDENT NONCITIZENS</u>

This category includes persons whose usual residence on Census Day is in the 50 states, but who are not citizens of the United States. This group includes aliens, whether documented or undocumented, and foreign diplomats.

The above groups define whom we should or should not include in the decennial count. Questions on where to count persons within these groups are applicable to the following subgroups:

- o The noninstitutionalized civilian population, which includes, for example:
  - Persons temporarily away from their usual residence on Census Day.
  - Persons with no permanent residence on Census Day.
  - Persons away from the parental home and living at college on Census Day.
  - Persons away from the parental home and living at boarding school (elementary or secondary) on Census Day.
  - Persons with multiple residences on Census Day.
  - Crews of U.S. merchant vessels.
  - Persons moving between usual residences on Census Day.
  - Persons residing in migrant labor camps on Census Day.
- o The institutionalized civilian population, which includes, for example:
  - Persons in correctional institutions on Census Day.
  - Persons in long-term health care institutions on Census Day.
- o The military population, which includes, for example:
  - Land-based military personnel.
  - Crews of U.S. military vessels (including the U.S. Coast Guard).

IV. ENUMERATION AND RESIDENCE RULES FOR 1990

A. CONCEPTUAL BASIS FOR ENUMERATION AND RESIDENCE RULES

The Census Bureau establishes enumeration rules in response to the question of whom to include in the decennial census count. In establishing the enumeration rules, the Census Bureau relies on constitutional considerations, any relevant statutory requirements, and operational factors. Traditionally, the Census Bureau has understood the Constitution to mean that it must count persons (as opposed to citizens, property owners, or adults) who are inhabitants of the United States as of Census Day.

As the enumeration rules address "who to count" the residence rules address "where to count" a person, that is, where to assign a person geographically in the census files. In addressing this question, the Census Bureau must decide whether to count the person where found or contacted on Census Day or whether to count the person at another location based on established criteria.

Both legal and operational issues influence the decision on which residency option to use. The Census Act of 1790 stated:

> That every person whose usual place of abode shall be in any family on the aforesaid first Monday in August next, shall be returned as of such family . . . . Every person occasionally absent at the time of the enumeration . . . belongs to that place in which he usually resides.

The drafters of the Census Act of 1790 implemented the constitutional mandate by developing the concept of usual residence as the criterion for determining where to count a person. All subsequent censuses have used this concept to determine where to count a person.

Carefully designed and executed procedures based on the usual residence concept afford the best opportunity to achieve the goal of obtaining accurate counts for all geographic areas in 1990. The adoption of usual residence as the main residency rule for 1990 does not mean that the Census Bureau will not modify that rule. Such has been the case for our most recent censuses--we used physical location as the criterion for where to count the homeless, used "home of record" as the criterion for where to count the overseas military population in 1970, and included boarding school

students (elementary and secondary) in the count at their parental home rather than at their school residence.

Along with the questions of whom to count and where to count them, the enumeration and residence concepts also encompass temporal considerations. We have traditional taken censuses as of a specific date, the idea being to capture an image of the population as of that specific date. The Census Act of 1790 established the first Monday in August 1790 as the census reference date, even though the U.S. marshals and their assistants did not complete the enumeration until 18 months later.[1/] The actual reference date of the census has changed frequently over the past 200 years in response to operational considerations. The reference date used in most censuses during the 19th century was June 1. January 1 was the scheduled date for the census of 1920 to accommodate an agriculture census taken at the same time.[1/] The Census Bureau first established the date of April 1 for the 1930 census and it has used that date up to the present time. Title 13, United States Code mandates the specific date for the 1990 census--April 1, 1990.

While April 1, 1990 is the reference date for the census, the complexity and time frame of the census-taking operations are such that the Census Bureau will not contact everyone on that date. The anticipated exceptions are noted in sections IVB and IVC below.

B. ENUMERATION RULES

1. RESIDENT CITIZENS

Resident citizens are part of the persons in Article I, Section 2 of the Constitution as amended by Section 2 of the Fourteenth Amendment. The apportionment count will include those living in the 50 states.

2. NONRESIDENT CITIZENS

The overseas population includes Armed Forces members Federal civilian employees, the dependents of these groups as well as other American citizens living abro on Census Day. Before the 1950 census, U.S. Attorney General J. Howard McGrath, in an opinion dated August 26, 1949, said that the Congress had vested the Director of the Census Bureau with the discretion to determine procedural issues, including the enumeration of Americans abroad. Assistant

Attorney General William H. Rehnquist reaffirmed McGrath's opinion in 1969.[5]

Thus, the decision on whether to count this population subgroup is discretionary. It rests on operational feasibility and efficiency with respect to obtaining accurate counts, and, to a certain extent, on data user needs. Since 1900, the Census Bureau has obtained administrative counts of at least a portion of this population subgroup. In 1970, as a result of the unusually large number of Americans (both military and civilian) involved in Vietnam, the Census Bureau counted military and Federal civilian employees and their dependents overseas and included them in the apportionment totals.[5] The procedure followed in 1970 was not based on a change in the Census Bureau's traditional understanding of the Constitution or other laws governing the apportionment process, but rather it was an effort to comply with the spirit of the law due to the large numbers of persons overseas. The Census Bureau has not included counts of other Americans living abroad in any census apportionment totals.

In 1980, the Census Bureau obtained administrative counts of military and Federal civilian employees and their dependents overseas. Since the unusual circumstances of war time did not exist in 1980, the official census tabulations for states did not include these counts. Finally, the Census Bureau did not attempt to obtain counts of other Americans overseas in 1980.

The specific categories of Americans overseas and the Census Bureau's enumeration rules for them in 1990 follow.

MILITARY PERSONNEL AND THEIR DEPENDENTS LIVING OVERSEAS

This category includes members of the Armed Forces and their dependents stationed overseas. It also includes crews of military ships deployed to the Navy's 6th (Atlantic) or 7th (Pacific) Fleet.

The Department of the Defense frequently updates and verifies administrative record counts of the overseas military personnel and their dependents.[6] Since the Census Bureau can obtain counts of persons in this category efficiently from Department of Defense administrative records, we plan to obtain

the counts in 1990 and include them in the U.S. Summary Report on Number of Inhabitants.* We will not include the counts in the official totals for the states since the assignment to geography would be arbitrary and operationally difficult.

FEDERAL CIVILIAN EMPLOYEES AND THEIR DEPENDENTS LIVING OVERSEAS

Since the Census Bureau can obtain counts of persons in this category from administrative records provided by the Office of Personnel Management, we plan to publish counts of this population subgroup in 1990. We will not include these counts in the official totals for the states since the assignment to geography would be arbitrary and operationally difficult.

OTHER AMERICANS LIVING OVERSEAS

In the 1960 and the 1970 censuses the Census Bureau made attempts to obtain counts of Americans overseas who were not affiliated with the Federal Government. These attempts were not successful. For example, in 1970 we counted 680,000 civilians overseas, but data from foreign censuses show there were at least 1.2 million U.S. citizens overseas in 1970.[6] The decision on whether or not the Census Bureau should count this population subgroup is dependent on operational issues regarding accuracy and efficiency. Assuming that the Census Bureau could develop an operational definition, we would still face many problems trying to obtain an accurate count. We do not know any administrative records that the Census Bureau could use to obtain a count of this population subgroup, thus, we would have to use direct enumeration. Voluntary outreach and publicity efforts by U.S. embassies and legations together with religious organizations, businesses,

* The Department of Defense is presently negotiating with the Census Bureau for a direct enumeration of military personnel and their dependents living overseas. The plan would provide for counts based on an actual enumeration, rather than administrative records. The Census Bureau would not include the counts in the apportionment or other official totals for any state.

and colleges during the 1970 census were only marginally successful.6/ It is unlikely that the Census Bureau can direct effective and efficient outreach efforts toward this group in 1990. Given the many operational problems associated with obtaining an accurate count, the Census Bureau does not plan to count Americans living overseas who are not employees of the U.S. government.

The Census Bureau does plan to investigate the feasibility of obtaining administrative record counts of Americans overseas who are employees of the United States or multi-national corporations.

3. RESIDENT NONCITIZENS

The Census Bureau's traditional understanding of the Constitution and statutory law concerning the census is that it must attempt to count all residents, regardless of legal status. Throughout the past 20 censuses we have followed this traditional understanding of the Constitution. The following discussion details the Census Bureau's plans for counting persons in 1990 who are citizens of foreign countries.

RESIDENT ALIENS

This category includes citizens of foreign countries who are living in the United States on visas such as work or student visas. It also includes undocumented aliens who entered the country illegally and those who entered the country legally but violated the terms of their visas. The Census Bureau has always attempted to count all persons whose usual residence on Census Day is in the United States, without regard to their legal status or citizenship, except for foreign travelers and residents of diplomatic missions.

For purposes of apportionment of the House of Representatives, the Census Bureau understands that the Constitution requires it to attempt to count all persons in each state without regard to their citizenship or legal status. The Federation for American Immigration Reform (FAIR) and several Members of Congress challenged this procedure before the 1980 census. In their suit against the Census Bureau, the plaintiffs charged that the count should not include illegal aliens for apportionment purposes. The government attorneys' legal argument centered on the wording in the Constitution, which

specifies persons as the basis for apportionment, without distinguishing among the inhabitants other than Indians not taxed and slaves. Although the Court decided the lawsuit on procedural grounds (lack of standing), it did observe that illegal aliens "are clearly persons."7/

Based on the traditional understanding of the Constitution, the Census Bureau will attempt to count all persons, including documented and undocumented aliens, residing in the United States on April 1, 1990. We will not count undocumented aliens who have not established a residence in the United States.

FOREIGN DIPLOMATS

Foreign diplomats include citizens of foreign countries attached to an embassy, consulate, legation, or chancellery of a foreign country or employed by an international agency or mission such as the United Nations, the World Bank, or the International Monetary Fund. Beginning with the 1940 census, the Census Bureau has not counted such persons residing within the compound of an embassy or legation, since the diplomatic missions where they reside are actually foreign territory. The Census Bureau has counted in recent censuses employees of foreign embassies who do not live at the embassy.8/

For the 1990 census, the Census Bureau does not plan to count citizens of a foreign country living on the premises of an embassy or legation because such persons are not residents of the United States. We will count foreign diplomatic personnel not living on the premises of an embassy or legation. The rationale for counting such persons is that they are residents of the United States.

C. RESIDENCE RULES

The Census Bureau will use the usual residence concept as the primary rule in determining where to include residents in the count. While the goal of the 1990 census is to count residents at their usual residence as of April 1, 1990, there are situations in which we must make special provisions to ensure that we meet this part of the goal. For the 1990 census, the Census Bureau must develop residence rules for persons whose usual

residence is not the place where they are on Census Day or whose usual residence is ambiguous. The Census Bureau's plans for addressing these groups in 1990 follow.

1. PERSONS AWAY FROM THEIR USUAL RESIDENCE ON CENSUS DAY

The Census Act of 1790 provided for the counting at the usual residence of persons temporarily absent from it at the time of the census. This practice has continued for all subsequent censuses and we will repeat it in the 1990 census.

Persons who report that their usual residence is different from the place where the Census Bureau contacts them include those traveling, living temporarily in hotels and motels, or maintaining a usual home elsewhere. The Census Bureau contacts such persons where they are physically staying on Census Day but asks them to provide the address of their usual residence. We then locate the questionnaire for the reported usual residence and add the person to that questionnaire if no one has reported him or her as a member of that residence already.

There are persons, though, who will not report the address of their usual residence or who will report an address that the Census Bureau can not identify on the census address file. We refer to such an address as an unidentifiable usual residence. 9/

The Census Bureau has examined several options for counting persons with unidentifiable usual residences. We have considered carefully how well each option contributes to the goal of obtaining accurate counts for all geographic areas. Some options examined would involve counting such persons at the place where we contact them, a procedure that might lead to an overcount to the extent that a household respondent or neighbor reports the persons at the usual residence. The other option would involve not counting them at the place where we contact them, the assumption being that a household respondent or neighbor would report such persons at the usual residence. If a household respondent or neighbor does not report these persons as household members at the usual residence, adoption of this option could lead to an undercount.

In weighing these options against the goal of the census, the Census Bureau has determined that the option most in line with the enumeration and residence concepts is to assume that a household respondent or neighbor will report these persons at the usual residence. Accordingly, we have designed the 1990 enumeration and closeout procedures to count such persons at their usual residence. The Census Bureau believes that the extent of any undercount in a particular geographic area as a result of using this procedure would be substantially less than any concentrated overcount resulting from the adoption of the alternative procedure.

2. PERSONS WITH MULTIPLE RESIDENCES

Examples of persons with multiple residences include those who live for substantial periods at a residence other than their primary residence, children who spend time at each parental home, working couples in which the husband and wife maintain residences in separate cities, and Members of Congress who maintain residences in their home states as well as in the Washington, D.C. area. The recent uptrend in some of these and other similar situations challenges the usual residence concept to the extent that the usual residence of persons with multiple residences is ambiguous or unclear.

There are two options available to the Census Bureau for counting persons with multiple residences. The Census Bureau can allow such persons to choose one residence as the primary residence or we can assign usual residence on the basis of objective criteria.

As in past censuses, for 1990 the Census Bureau plans to provide respondent instructions on the census questionnaire that will allow persons with multiple residences to identify one residence as their usual residence. We will count these persons at that residence. Similarly, the Census Bureau plans to count Members of Congress either at their Washington, D.C. area address or at their home state address, dependant upon which one they consider to be their usual residence.

3. PERSONS WITH NO PERMANENT RESIDENCE

Persons without a permanent residence include those living temporarily in housing units with friends or relatives, those living in transient quarters (motels, missions, shelters, and so forth) who do not claim a usual home elsewhere, and the homeless ("street people"). Since 1790, the Census Bureau has counted such persons as residents of the area where contacted. For 1990, the Census Bureau again plans to count all persons without a permanent residence in the area where we contact them.[9]

To obtain an accurate count of persons without a usual residence, the Census Bureau plans to conduct a special enumeration of persons living in shelters for the homeless and of "street people." This special enumeration will include a pre-Census Day identification of shelters, public parks, city blocks, and so forth, where the homeless congregate. The Census Bureau plans to ask local officials and local organizations that work with the homeless for assistance in identifying these places. Finally, we will use teams of interviewers to visit these places during a special "S-Night" to count persons found living or staying there.

4. PERSONS AWAY AT COLLEGE

Since the 1950 census, the Census Bureau has counted college students where they are living while attending college; before 1950, we counted students at the parental home. The Census Bureau changed the policy in 1950 because we had evidence that we were not counting some college students at all. In addition, applying the usual residence rule to college students required that we count them at the college. Following the 1970 census, the Borough of Bethel Park Pennsylvania challenged the Census Bureau's policy of counting college students at the college. The U.S. District Court that heard the suit ruled that the Census Bureau's policy for counting college students was "reasonable" since such students eat, sleep, and work for most of the year in the area of the college.[10]

In deciding where to count college students in 1990, the Census Bureau has considered the available options in light of the goal of the census. College students, particularly those living in dormitories, have a chance of being reported and counted at the parental residence. If we do not identify these

cases, this could result in an overcount. On the other hand, to count college students at their parental home would be an unnecessary departure from the usual residence rule. In addition, some college students living in college dormitories no longer live with their parents at any time, and, hence, we can only count them at their college residence. Not counting such students at college could lead to an undercount. Finally, the practice of the Census Bureau in recent censuses of counting college students at their college residences has been upheld by a U.S. District Court.

Adherence to the usual residence concept requires that the Census Bureau continue to count college students at their residence at school in 1990.

5. PERSONS AWAY AT BOARDING SCHOOL

The Census Bureau traditionally counts boarding school students below the college level at their parental home. This procedure has continued in recent censuses because of the age of the students and their dependency on their parents.

In deciding where to count boarding school students in 1990, the Census Bureau has considered the possible ramifications of counting such students at the boarding school. Given the age and dependency status of boarding school students compared to college students, the Census Bureau believes the chance of double counting the former is more likely if counted at school than the chance of double counting college students. In addition, there is no known statutory law or legal precedent that stipulates where to count boarding school students. Given the traditional practice of counting such students at the parental home as well as the small numbers involved, the Census Bureau plans to count boarding school students at their parental home in 1990. This procedure represents a variation of the usual residence rule. In this case, however, the Census Bureau believes that due to the nature of the population subgroup, this procedure follows legal requirements.

6. CREWS OF MERCHANT VESSELS

In previous censuses, the Census Bureau counted crew members aboard U.S. ocean-going, coastal, and Great Lakes vessels at the port where the ship was berthed on Census Day. If the ship was not berthed in a

U.S. port but was in U.S. territorial waters, we counted the crew at the port of destination, provided that port was inside the United States or its territories. If in territorial waters and headed overseas, we counted the crew at the vessel's homeport. If not in territorial waters, we did not count them. We did not make a special attempt to count persons aboard various other types of ships such as those on inland waterways, fishing vessels, or oil rigs. For 1980, the Census Bureau understood that the crews of these ships tend to be gone from home only a short period of time. Thus, we assumed that a household respondent or neighbor reported them at the usual residence.

Operational factors as well as adherence to the usual residence concept guide the Census Bureau's decision on counting this population subgroup in 1990. Crews of merchant vessels are very transient; while many have no home other than the ship on which they work, others do maintain a home on shore that they consider to be their usual residence. Therefore, the usual residence rule requires that we count them at that usual residence, whether on board ship or on shore.

For crew members whose residence is on board ship, the Census Bureau has options on where to pinpoint the ship geographically on Census Day. The use of homeport is one option, but homeports tend to be chosen for tax purposes; the crew generally does not live there and the ship may never dock there. Enumerating the crew at the port where the ship is docked on Census Day is an option that appears preferable. Similarly, for ships that are not berthed in a U.S. port on Census Day and are in territorial waters, the Census Bureau will count the crew at the port of destination, provided that the port is within the United States or the U.S. territories. If the port of destination is not in the United States or its territories, we will count the crew at the ship's port of departure. We will not count the crews of merchant ships that are not within territorial waters or that are not American flag vessels.

The Census Bureau plans to treat crews of canneries, freezer ships, and tuna ships the same as ocean-going vessels in the 1990 census. The crews of these vessels are at sea for several months

during the fishing season. The Census Bureau will count crew members who report a usual residence on shore at that residence.

The Census Bureau also plans to follow the practice of past censuses and not count crews of vessels on inland waterways, fishing vessels which deploy for short period, and oil rigs. The Census Bureau assumes that such persons maintain a residence on shore and that a household respondent or neighbor will report them at that usual residence.

7. LAND-BASED MILITARY PERSONNEL

The Census Bureau traditionally counts land-based members of the Armed Forces, including the U.S. Coast Guard, at the area where they are permanently stationed, provided it is within the United States or the U.S. territories. The use of usual residence to account for members of the Armed Forces is consistent with the criterion used to account for the civilian population.

The Census Bureau also will count military personnel assigned to a temporary duty station at the area of their permanent duty station.

8. CREWS OF MILITARY SHIPS

Before the 1970 census, the criterion used to determine where to count crews of military ships not deployed, including the U.S. Coast Guard, was the actual location of the ship on Census Day. In the 1970 and 1980 censuses, the Census Bureau counted the crews of such ships at the ship's homeport, regardless of the ship's location on Census Day, unless deployed to the 6th (Atlantic) or 7th (Pacific) Fleet. There were exceptions to this policy, however, in the 1980 census. If the ship's homeport contained total military shipboard strength of 1,000 or more, the Census Bureau allowed a crew member to claim a usual home elsewhere if the usual residence was within 50 miles of the port. If we could locate the address for the crew member, we counted the person at the usual residence; otherwise, the ship was the usual residence.[11/] For the 1990 census, the Census Bureau plans to use the usual residence rule to determine where to count crews of military ships not deployed to the 6th or 7th Fleet. If the person's usual residence is the ship, the Census Bureau will count the person at the homeport location. In situations where the

homeport includes more than one jurisdiction, the Census Bureau will count the crew at the jurisdiction where the ship is actually docked. The Census Bureau will allow crew numbers to report a usual residence ashore, regardless of the afloat strength of the homeport. We will attempt to match all such reports to the questionnaire for the home address and to match the person to the appropriate household. Thus, we will count crew members at their usual residence, whether it is on board ship or on shore.

9. MOVERS

Although resident citizens who move on or near Census Day are part of the resident population, obtaining accurate counts of this population subgroup has been operationally difficult in recent censuses.

The basic issue about counting movers concerns the application of the usual residence concept. Theoretically, the Census Bureau could count persons who move on or near Census Day at their old residence, at their new residence, or at a temporary residence. Thus, the operational problem is one of ensuring that we contact movers at one of the three possible locations but count them at only one. In 1990, the Census Bureau plans to develop enumerator and respondent instructions designed to ensure that we count movers at their usual residence as of Census Day. Thus, the Census Bureau will ask for the Census Day address of persons who moved on or near Census Day and who report that we have not already counted them at that address. We will count such persons at that Census Day address.

10. MIGRANT WORKERS

Before the 1980 census, we counted residents of migrant worker camps at the locality that contained the camp, the justification was that the camps have shifting populations composed mainly of persons with no fixed residence. Research after 1970 showed that many migrant workers did in fact have a place they considered as their usual residence. Thus, in the 1980 census, the Census Bureau gave residents of migrant worker camps the option of designating a usual residence other than at the camp where we contacted them. Based on their response, we counted them either at the reported usual residence or at the camp where we contacted them. 10/

For the 1990 census, the Census Bureau plans to continue the practice of allowing residents of migrant worker camps to designate a usual residence other than the camp. We will count them at the usual residence if they report one. If they do not report a usual residence we will count them at the migrant worker camp.

11. INSTITUTIONALIZED RESIDENTS

The institutionalized population consists of all residents living under formally authorized, supervised care or custody. The facilities that house this population include correctional schools, penitentiaries, wards for juveniles, specialized hospitals, nursing homes for the elderly, and homes for the physically and mentally handicapped.11/

For the 1990 census, the Census Bureau plans to differentiate between long-term and short-term facilities. We will count persons residing in long-term facilities (for example, penitentiaries, and mental hospitals) as residents of the institution. The Census Bureau will count persons residing in short-term facilities (for example, county jails and general hospitals) at their usual place of residence if they have one. This practice is consistent with the practices of recent censuses in applying the usual residence concept to persons residing in such facilities.

V. CONCLUSION

Enumeration and residence concepts for the 1990 census provide the basic framework for meeting the goal of the census. We will achieve that goal by appropriate strategies, methods, and procedures. Developing the universe of interest within the legal parameters by carefully defining who and where to count is a critical component of the Census Bureau's concept of enumeration for the 1990 census.

In addressing whom to count, the concept of enumeration for 1990 is based on the Constitution and applicable statutory law which the Census Bureau has traditionally understood to require that all residents, regardless of citizenship or legal status, are part of the universe of interest which we must attempt to count. The first Census Act of 1790, based on an understanding of the constitutional mandate, established the concept of counting residents, not just citizens, and is consistent with the conceptual basis for the past 20 censuses.

The first census also established the concept of usual residence, and that is the conceptual basis for determining where to count persons in the 1990 census. The adoption of a usual residence concept is consistent with the goal of obtaining accurate counts at all geographic levels as well.

The enumeration and residence concepts for 1990 will ensure that the 21st Decennial Census of Population and Housing is the most complete and accurate of any in our country's history.

NOTES

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NOT This Report is not reproduced with the Stipulation of Facts because it appears at pages 181-211 of the Administrative Record

Attachment 2

Exhibit B

DECENNIAL CENSUS RESIDENCE RULES AND ENUMERATION PRINCIPLES

A Report

Prepared for the Bureau of the Census by

CZC Associates
1522 K Street N.W., Suite 522
Washington, D.C. 20005
(202) 682-1358

February 1987

APPENDIX E.
Facsimiles of Respondent Instructions and Questionnaire Pages

Your Guide for the

1990 U.S. Census Form

This guide gives helpful information on filling out your census form. If you need more help, call the local U.S. census office. **The telephone number is on the cover of the questionnaire.** After you have filled out your form, please return it in the **envelope** we have provided.

On the inside	Page
How to fill out your census form	2
Example	2
Your answers are confidential	2
Instructions for the census questions	3–5
What the census is about	5
Why the census asks certain questions	5

CENSUS '90

U.S. DEPARTMENT OF COMMERCE
BUREAU OF THE CENSUS

EXHIBIT B

How to Fill Out Your Census Form

Please use a black lead pencil only. Black lead pencil is better to use than ballpoint or other pens. Most questions ask you to fill in the circle, or to print the information. See Example below.

Make sure you print answers for everyone in this household. If someone in the household, such as a roomer or boarder, does not want to give you all the information for the form, print at least the person's name and answer questions 2 and 3. A census taker will call to get the other information directly from the person.

There may be a question you cannot answer exactly. For example, you might not know the age of an elderly person or the price for which your house would sell. Ask someone else in your household; if no one knows, give your best estimate.

Instructions for individual questions begin on page 3 of this guide. They will help you to understand the questions and answer them correctly.

If you have a question about filling out the census form or need assistance, call the local U.S. census office. The telephone number is given on the cover of the questionnaire.

If you do not mail back your census form, a census taker will be sent out to assist you. But it saves time and your taxpayer dollars if you fill out the form yourself and mail it back.

Example

a. Age	b. Year of birth	a. Age	b. Year of birth
41	1949	09	1981

Your Answers Are Confidential

The law authorizing the census (Title 13, U.S. Code) also provides that your answers are confidential. No one except census workers may see your completed form and they can be fined and/or imprisoned for any disclosure of your answers. Only after 72 years can your individual census form become available to other government agencies (whether federal, state, county, or local). Until then, no other person or business can see your individual report.

The same law that protects the confidentiality of your answers requires that you provide the information asked in this census to the best of your knowledge.

Information collected from the decennial census is used for a variety of statistical purposes. Census information is used to find out where funding is most needed for schools, health centers, highways, and other services. Census results are used by members of public and private groups—including community organizations—and by businesses and industries, as well as by agencies at all levels of government.

Instructions for Questions 1a through 7

1a. List everyone who lives at this address in question 1a. If you are not sure if you should list a person, see the rules on page 1 of the census form. If you are still not sure, answer as best you can and fill in "Yes" for question H1a or H1b, as appropriate.

If there are more than seven people in your household, please list all the persons in question 1a, complete the form for seven people, and mail it back in the enclosed envelope. A census taker will call to obtain the information for the additional persons.

b. If everyone listed in question 1a usually lives at another address(es), print the address(es) in 1b.

2. Fill one circle to show how each person is related to the person in column 1.

If Other relative of the person in column 1, print the exact relationship such as son-in-law, daughter-in-law, grandparent, nephew, niece, mother-in-law, father-in-law, cousin, and so on.

If the **Stepson/stepdaughter** of the person in column 1 also has been legally adopted by the person in column 1, mark **Stepson/stepdaughter** but do not mark **Natural-born or adopted son/daughter**. In other words, **Stepson/stepdaughter** takes precedence over **Adopted son/daughter**.

4. Fill ONE circle for the race each person considers himself/herself to be.

If you fill the **Indian (Amer.)** circle, print the name of the tribe or tribes in which the person is enrolled. If the person is not enrolled in a tribe, print the name of the principal tribe(s).

If you fill the **Other API** circle (under Asian or Pacific Islander (API)), only print the name of the group to which the person belongs. For example, the Other API category includes persons who identify as Burmese, Fijian, Hmong, Indonesian, Laotian, Bangladeshi, Pakistani, Tongan, Thai, Cambodian, Sri Lankan, and so on.

If you fill the **Other** race circle, be sure to print the name of the race.

If the person considers himself/herself to be **White, Black or Negro, Eskimo or Aleut**, fill one circle only. Please do not print the race in the boxes.

The **Black or Negro** category also includes persons who identify as African-American, Afro-American, Haitian, Jamaican, West Indian, Nigerian, and so on.

All persons, regardless of citizenship status, should answer this question.

5. Print age at last birthday in the space provided (print "00" for babies less than 1 year old). Fill in the matching circle below each box. Also, print year of birth in the space provided. Then fill in the matching circle below each box. For an illustration of how to complete question 5, see the Example on page 2 of this guide.

6. If the person's only marriage was annulled, mark **Never married**.

7. A person is of **Spanish/Hispanic origin** if the person's origin (ancestry) is Mexican, Mexican-Am., Chicano, Puerto Rican, Cuban, Argentinean, Colombian, Costa Rican, Dominican, Ecuadoran, Guatemalan, Honduran, Nicaraguan, Peruvian, Salvadoran, from other Spanish-speaking countries of the Caribbean or Central or South America, or from Spain.

If you fill the **Yes, other Spanish/Hispanic** circle, print one group.

A person who is not of Spanish/Hispanic origin should answer this question by filling the **No (not Spanish/Hispanic)** circle. Note that the term "Mexican-Am." refers only to persons of Mexican origin or ancestry.

All persons, regardless of citizenship status, should answer this question.

Instructions for Questions H1a through H6

H1a. Refer to the list of persons you entered in question 1a on page 1. If you left anyone out of your list because you were not sure if the person(s) should be listed, answer question H1a as Yes. Then enter the name(s) and reason(s) why you did not list the person(s) on the lines provided. Otherwise, answer question H1a as No.

b. If you included anyone on your list even though you were not sure that you should list the person(s), answer question H1b as Yes. Then enter the name(s) and reason(s) why you listed the person(s) on the lines provided. Otherwise, answer question H1b as No.

H2. Fill only one circle.

Count all occupied and vacant apartments in the house or building. Do not count stores or office space.

Detached means there is open space on all sides, or the house is joined only to a shed or garage. *Attached* means that the house is joined to another house or building by at least one wall that goes from ground to roof. An example of A **one-family house attached** to one or more houses is a house in a row of houses attached to one another.

A mobile home or trailer that has had one or more rooms added or built onto it should be counted as a **one-family detached house**; a porch or shed is not considered a room.

H3. Count only whole rooms in your house, apartment, or mobile home used for living purposes, such as living rooms, dining rooms, kitchens, bedrooms, finished recreation rooms, family rooms, etc. Do not count bathrooms, kitchenettes, strip or pullman kitchens, utility rooms, foyers, halls, half-rooms, porches, balconies, unfinished attics, unfinished basements, or other unfinished space used for storage.

H4. Housing is owned if the owner or co-owner lives in it. Mark **Owned by you or someone in this household with a mortgage or loan** if the house, apartment, or mobile home is mortgaged or there is a contract to purchase. Mark **Owned by you or someone in this household free and clear (without a mortgage)** if there is no mortgage or other debt. If the house, apartment, or mobile home is owned but the land is rented, mark this question to show the status of the house, apartment, or mobile home.

Mark **Rented for cash rent** if any money rent is paid, even if the rent is paid by persons who are not members of your household, or by a federal, state, or local government agency.

Mark **Occupied without payment of cash rent** if the unit is not owned or being bought by the occupants and if money rent is not paid or contracted. The unit may be owned by friends or relatives who live elsewhere and who allow occupancy without charge. A house or apartment may be provided as part of wages or salary. Examples are: caretaker's or janitor's house or apartment; parsonages; tenant farmer or sharecropper houses for which the occupants do not pay cash rent; or military housing.

H5a. Answer H5a and H5b if you live in a one-family house or mobile home; include only land which you own or rent.

b. A business is easily recognized from the outside; for example, a grocery store or barber shop. A medical office is a doctor's or dentist's office regularly visited by patients.

H6. If this is a house, include the value of the house, the land it is on, and any other structures on the same property. If the house is owned but the land is rented, estimate the combined value of the house and the land. If this is a condominium unit, estimate the value for your house or apartment including your share of the common elements. If this is a mobile home, include the value of the mobile home and the value of the land. If you rent the land, estimate the value of the rented land and add it to the value of the mobile home.

Instructions for Questions H7a and H7b

H7a. Report the rent agreed to or contracted for, even if the rent for your house, apartment, or mobile home is unpaid or paid by someone else.

If rent is paid:	Multiply rent by:	If rent is paid:	Divide rent by:
By the day	30	4 times a year	3
By the week	4	2 times a year	6
Every other week	2	Once a year	12

b. Answer Yes if meals are included in the monthly rent payment, or you must contract for meals or a meal plan in order to live in this building.

What the Census Is About – Some Questions and Answers

Why are we taking a census?

The most important reason for taking a decennial census is to determine how many representatives each state will have in Congress.

What does the Census Bureau do with the information you provide?

The individual information collected in the census is grouped together into statistical totals. Information such as the number of persons in a given area, their ages, educational background, the characteristics of their housing, etc., enable government, business, and industry to plan more effectively.

How long have we been taking the census?

The first census was taken in 1790 in accordance with the requirement in the first article of the constitution. A census has been taken every 10 years since. The 1990 Decennial Census marks the 200th anniversary of the census.

How are you being counted?

Census forms are delivered to all households a few days before census day. Households are requested to fill out the form and mail it back to the census office.

Why the Census Asks Certain Questions

Here are a few reasons for asking some of the questions.

It is as important to get information about people and their houses as it is to count them.

Name? Names help make sure that everyone in a household is counted, but that no one is counted twice.

Value or rent? Government and planning agencies use answers to these questions in combination with other information to develop housing programs to meet the needs of people at different economic levels.

CENSUS '90

OFFICIAL 1990 U.S. CENSUS FORM

Thank you for taking time to complete and return this census questionnaire. It's important to you, your community, and the Nation.

The law requires answers but guarantees privacy.

By law (Title 13, U.S. Code), you're required to answer the census questions to the best of your knowledge. However, the same law guarantees that your census form remains confidential. For 72 years–or until the year 2062–only Census Bureau employees can see your form. No one else–no other government body, no police department, no court system or welfare agency–is permitted to see this confidential information under any circumstances.

How to get started–and get help.

Start by listing on the next page the names of all the people who live in your home. Please answer all questions with a black lead pencil. You'll find detailed instructions for answering the census in the enclosed guide. If you need additional help, call the toll-free telephone number to the left, near your address.

Please answer and return your form promptly.

Complete your form and return it by April 1, 1990 in the postage-paid envelope provided. Avoid the inconvenience of having a census taker visit your home.

Again, thank you for answering the 1990 Census.
Remember: Return the completed form by April 1, 1990.

Para personas de habla hispana –
(For Spanish-speaking persons)

Si usted desea un cuestionario del censo en español, llame sin cargo alguno al siguiente número: 1-800-CUENTAN
(o sea 1-800-283-6826)

U.S. Department of Commerce
BUREAU OF THE CENSUS
FORM D-1

OMB No. 0607-0638
Approval Expires 07/31/91

The 1990 census must count every person at his or her "usual residence." This means the place where the person lives and sleeps most of the time.

1a. List on the numbered lines below the name of each person living here on Sunday, April 1, including all persons staying here who have no other home. If EVERYONE at this address is staying here temporarily and usually lives somewhere else, follow the instructions given in question 1b below.

Include

- Everyone who usually lives here such as family members, housemates and roommates, foster children, roomers, boarders, and live-in employees
- Persons who are temporarily away on a business trip, on vacation, or in a general hospital
- College students who stay here while attending college
- Persons in the Armed Forces who live here
- Newborn babies still in the hospital
- Children in boarding schools below the college level
- Persons who stay here most of the week while working even if they have a home somewhere else
- Persons with no other home who are staying here on April 1

Do NOT include

- Persons who usually live somewhere else
- Persons who are away in an institution such as a prison, mental hospital, or a nursing home
- College students who live somewhere else while attending college
- Persons in the Armed Forces who live somewhere else
- Persons who stay somewhere else most of the week while working

Print last name, first name, and middle initial for each person. Begin on line 1 with the household member (or one of the household members) in whose name this house or apartment is owned, being bought, or rented. If there is no such person, start on line 1 with any adult household member.

	LAST	FIRST	INITIAL		LAST	FIRST	INITIAL
1				7			
2				8			
3				9			
4				10			
5				11			
6				12			

1b. If EVERYONE is staying here only temporarily and usually lives somewhere else, list the name of each person on the numbered lines above, fill this circle ⟶ ○ and print their usual address below. DO NOT PRINT THE ADDRESS LISTED ON THE FRONT COVER.

House number — Street or road/Rural route and box number — Apartment number

City — State — ZIP Code

County or foreign country — Names of nearest intersecting streets or roads

NOW PLEASE OPEN THE FLAP TO PAGE 2 AND ANSWER ALL QUESTIONS FOR THE FIRST 7 PEOPLE LISTED. USE A BLACK LEAD PENCIL ONLY.

PLEASE ALSO ANSWER HOUSING QUESTIONS ⟶ PAGE 3

Please fill one column ➡ for each person listed in Question 1a on page 1.

	PERSON 1	PERSON 2
	Last name / First name / Middle name	Last name / First name / Middle name
2. How is this person related to PERSON 1? Fill ONE circle for each person. If Other relative of person in column 1, fill circle and print exact relationship, such as mother-in-law, grandparent, son-in-law, niece, cousin, and so on.	START in this column with the household member (or one of the members) in whose name the home is owned, being bought, or rented. If there is no such person, start in this column with any adult household member. ■	If a RELATIVE of Person 1: ○ Husband/wife ○ Natural-born or adopted son/daughter ○ Stepson/stepdaughter ○ Brother/sister ○ Father/mother ○ Grandchild ○ Other relative → 7 If NOT RELATED to Person 1: ○ Roomer, boarder, or foster child ○ Unmarried partner ○ Housemate, roommate ■ ○ Other nonrelative
3. Sex Fill ONE circle for each person.	○ Male ○ Female	○ Male ○ Female
4. Race Fill ONE circle for the race that the person considers himself/herself to be. If Indian (Amer.), print the name of the enrolled or principal tribe. ⟶ If Other Asian or Pacific Islander (API), print one group, for example: Hmong, Fijian, Laotian, Thai, Tongan, Pakistani, Cambodian, and so on. ⟶ If Other race, print race. ⟶	○ White ○ Black or Negro ○ Indian (Amer.) (Print the name of the enrolled or principal tribe.) → 7 ○ Eskimo ○ Aleut Asian or Pacific Islander (API) ○ Chinese ○ Japanese ○ Filipino ■ ○ Asian Indian ○ Hawaiian ○ Samoan ○ Korean ○ Guamanian ○ Vietnamese ○ Other API → 7 ○ Other race (Print race.) → 7	○ White ○ Black or Negro ○ Indian (Amer.) (Print the name of the enrolled or principal tribe.) → 7 ○ Eskimo ○ Aleut Asian or Pacific Islander (API) ○ Chinese ○ Japanese ○ Filipino ■ ○ Asian Indian ○ Hawaiian ○ Samoan ○ Korean ○ Guamanian ○ Vietnamese ○ Other API → 7 ○ Other race (Print race.) → 7
5. Age and year of birth a. Print each person's age at last birthday. Fill in the matching circle below each box. b. Print each person's year of birth and fill the matching circle below each box.	a. Age: 0 0 0 0 0 C / 1 ○ 1 ○ 1 ○ / 2 ○ 2 ○ / 3 ○ 3 ○ / 4 ○ 4 ○ / 5 ○ 5 ○ / 6 ○ 6 ○ / 7 ○ 7 ○ / 8 ○ 8 ○ / 9 ○ 9 ○ b. Year of birth: 1 ■ 8 ○ 0 ○ 0 ○ / 9 ○ 1 ○ 1 ○ / 2 ○ 2 ○ / 3 ○ 3 ○ / 4 ○ 4 ○ / 5 ○ 5 ○ / 6 ○ 6 ○ / 7 ○ 7 ○ / 8 ○ 8 ○ / 9 ○ 9 ○	a. Age: 0 0 0 ○ 0 0 / 1 ○ 1 ○ 1 ○ / 2 ○ 2 ○ / 3 ○ 3 ○ / 4 ○ 4 ○ / 5 ○ 5 ○ / 6 ○ 6 ○ / 7 ○ 7 ○ / 8 ○ 8 ○ / 9 ○ 9 ○ b. Year of birth: 1 ■ 8 ○ 0 ○ 0 ○ / 9 ○ 1 ○ 1 ○ / 2 ○ 2 ○ / 3 ○ 3 ○ / 4 ○ 4 ○ / 5 ○ 5 ○ / 6 ○ 6 ○ / 7 ○ 7 ○ / 8 ○ 8 ○ / 9 ○ 9 ○
6. Marital status Fill ONE circle for each person.	○ Now married ○ Widowed ○ Divorced ○ Separated ○ Never married	○ Now married ○ Widowed ○ Divorced ○ Separated ○ Never married
7. Is this person of Spanish/Hispanic origin? Fill ONE circle for each person. If Yes, other Spanish/Hispanic, print one group. ⟶	○ No (not Spanish/Hispanic) ○ Yes, Mexican, Mexican-Am., Chicano ○ Yes, Puerto Rican ■ ○ Yes, Cuban ○ Yes, other Spanish/Hispanic (Print one group, for example: Argentinean, Colombian, Dominican, Nicaraguan, Salvadoran, Spaniard, and so on.) → 7	○ No (not Spanish/Hispanic) ○ Yes, Mexican, Mexican-Am., Chicano ○ Yes, Puerto Rican ○ Yes, Cuban ○ Yes, other Spanish/Hispanic (Print one group, for example: Argentinean, Colombian, Dominican, Nicaraguan, Salvadoran, Spaniard, and so on.) → 7
FOR CENSUS USE ⟶	○ ○ □	○ ○

Exhibit C

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

APR 14 1988

Honorable James C. Miller III
Director
Office of Management and Budget
Washington, D.C. 20503

Dear Mr. Miller:

This responds to your request for the views of the Department of Justice on H.R. 3639, a bill to prevent distortions in the reapportionment of the House of Representatives caused by the use of census population figures which include aliens, and H.R. 3814, "Relating to decennial censuses of population." In principal part, H.R. 3639 would eliminate illegal aliens from the United States census tabulation when apportioning representatives in Congress among the states. Like H.R. 3639, H.R. 3814 would exclude illegal aliens from the census count. It would include for apportionment purposes, however, members of the armed forces, civilian employees of the Department of Defense, and dependents of such members or employees, living overseas. For the reasons discussed below, we oppose passage of these bills because they raise serious constitutional problems.

Section two of the Fourteenth Amendment to the Constitution provides that:

> Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.

U.S. Const., amend. XIV, sec. 2.[1] This constitutional provision

[1] Section 2 replaces, in part, the provision in Article I, sec. 2, cl. 3 of the Constitution that provided:

> Representatives . . . shall be apportioned among the several States . . . according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons . . . three fifths of all other Persons.

Although we have not found any cases interpreting the breadth of

is implemented by 13 U.S.C. 141(b).[2] Section 2 of H.R. 3639 would add a new paragraph (g) to 13 U.S.C. 141 to require the Secretary of Commerce to

> make such adjustments in total population figures as may be necessary, using such methods and procedures as the Secretary determines appropriate, in order that aliens in the United States in violation of the immigration laws shall not be counted in tabulating population for purposes of subsection (b) of this section.

The legislative history accompanying section 2 of the Fourteenth Amendment makes clear that Congress intended for all persons, including aliens residing in this country, to be included in the "whole number of persons in each State." Id.

The end of the Civil War and the freeing of the slaves meant an end to apportionment based on the "three fifths" provision of Article 1. See note 1. The Reconstruction Congress realized that once readmitted, the former Confederate states would increase their population base by forty percent, adding twelve Representatives to their pre-war total of eighteen.[3] In an effort to undermine this growth in political power before these states were readmitted to the Union, the Thirty-ninth Congress examined various formulas designed to reduce representation whenever states, as expected, discriminated against portions of their male population by excluding them from voting on the basis of race.

For example, there was significant support in the Thirty-Ninth Congress for a proposal that representation be based on the number of male voters over the age of twenty-one. See, e.g., Cong. Globe, 39th Cong., 1st Sess. 404 (1866). However, this

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[1] (Cont.) Article I, the Founding Fathers were aware that the census, and therefore apportionment, would be based on the number of State inhabitants, not of voters. See, e.g., The Federalist Papers (C. Rossiter, ed.), No. 54, at 338.

[2] Section 141(b) provides:

> The tabulation of total population by States under [the census] as required for the apportionment of Representatives in Congress among the several States shall be completed within 9 months after the census date and reported by the Secretary to the President of the United States.

[3] G. Zuckerman, A Consideration of the History and Present Status of Section 2 of the Fourteenth Amendment, 30 Ford. L. Rev. 93, 94 (1961) (Zuckerman).

proposal met serious resistance from many of the Northern states, especially in New England. These states had disproportionately large populations of nonvoters, such as women (large numbers of men had left their homes to pioneer in the west) and aliens.[4] As Rep. Conkling, one of the original drafters of the Fourteenth Amendment, noted when defending his amendment to count persons rather than citizens, "[m]any of the large States now hold their representation in part by reason of their aliens, and the Legislatures and people of these States are to pass upon the amendment. It must be acceptable to them." Cong. Globe, 39th Cong., 1st Sess. 353 (1866).

Faced with extensive debate over the amendment's language, the Republicans became concerned that the measure would not pass the Senate.[5] They therefore went into caucus, agreeing to be bound by its decision, and adopted the present language regarding "persons" rather than "citizens." Notwithstanding the protests of opponents who bitterly denounced this language as nothing more than a political compromise designed to ensure passage of the amendment,[6] the Republicans held the majority and the amendment, apportioning representation on the "whole number of persons" in each state, was passed.

Thus, the Congress that passed the Fourteenth Amendment in 1866 not only recognized that aliens would be counted in the census but insisted upon their inclusion as part of a compromise designed to ensure that the amendment would be passed by the industrial states. They did so notwithstanding their acknowledgment that aliens were not bona fida members of the body politic.

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[4] Zuckerman, supra note 3, at 95. As Sen. Wilson noted:

> How [does this proposal affect] the loyal States? It throws out of the basis at least two and a half millions of unnaturalized foreign-born men and women, and by this we lose at least fifteen Representatives . . . . In 1860 there were in the loyal States 3,856,628 unnaturalized persons of foreign birth, and in the rebel States 233,661. I estimate that Massachusetts would lose one Representative certainly, and probably two, by this change; that New York would lose at least four, Pennsylvania two, Ohio two; and other States would lose in their representation.

Cong. Globe, 39th Cong., 1st Sess. 1286 (1866).

[5] Zuckerman, supra note 3, at 105.

[6] Cong. Globe, 39th Cong., 1st Sess. 404, 408 (1866) (statement of Rep. Lawrence). See also id. at 2939 (statement of Sen. Hendricks).

They rejected arguments that representation should be based on people with permanent ties to the country. They consciously chose to include aliens to advance their dual concerns: ensuring passage of the amendment by the northern states and denial to the South of any additional representation in Congress.

It is noteworthy that the Supreme Court, in analyzing section 1 of the Fourteenth Amendment, has read the word "person" to include illegal aliens. "Whatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments." Plyler v. Doe, 457 U.S. 202, 210 (1982) (citations omitted), reh'g denied 458 U.S. 1131 (1982). It would seem reasonable to assume that those whom the drafters of the Fourteenth Amendment intended to include in the word "persons" in section 1 of the amendment are the same "persons" included by section 2.

We must note that the Reconstruction Congress did not discuss the issue of illegal aliens when it debated the Fourteenth Amendment. It was, however, possible to be an illegal alien in 1866. The United States has had a statute since 1798 governing arrest and exclusion of aliens from hostile countries. Act of July 6, 1798, ch. 66, 1 Stat. 577 (Act), codified at 50 U.S.C. 21. The President is authorized to arrest, secure and remove, with the aid of the courts and the federal marshals, any such aliens he identifies. Moreover, this statutory authority had been exercised prior to 1866.[9] Thus, although the issue was not raised in the debate over the Fourteenth Amendment, certain classes of aliens could be excluded from the United States in 1866 and removed by order of the President if they attempted to return.[10]

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[7] See generally Note, Demography and Distrust: Constitutional Issues of the Federal Census, 94 Harv. L. Rev. 861, 865-68 (1981).

[8] C. Gordon and M. Rosenfeld, 1 Immigration Law & Procedure, at 1-8 (1985).

[9] Lockington v. Smith, 15 Fed. Cas. 758 (C.C. Pa. 1817) (No. 8448); Lockington's Case, Brightly N.P. 269 (Pa. 1813).

[10] Moreover, subsequent Congresses have acknowledged, by their efforts to exclude aliens from the census, that the Fourteenth Amendment requires the counting of all aliens. The 71st and 72nd Congresses debated passage of constitutional amendments that would have excluded aliens in the count for apportionment of representatives. See H.R. Rep. 2761, 71st Cong., 3d Sess. (1931); H.R. Rep. 823, 72d Cong., 1st Sess. (1932). The Senate legal counsel had earlier issued an opinion concluding that aliens could not be excluded. 71 Cong. Rec. 1821 (1929). In 1940, a bill to exclude aliens was defeated. See e.g., 86 Cong.

The Department of Justice has advised previous Congresses considering identical legislation that aliens must be included within the census for purposes of apportioning congressional Representatives,[11] and has adopted that position in court.[12] We have reexamined this position and continue to believe that it is *sound*. Accordingly, we find that to the extent that H.R. 3639 and H.R. 3814 would exclude illegal aliens from the census, they are unconstitutional.

We turn now to the question of whether it is constitutional to include in any tabulation of population for purposes of the apportionment any members of the armed forces, civilian employees of the Department of Defense (DOD), or dependents of such members or employees, when any such individuals are assigned to a post outside the United States. While we continue to review the case law and legislative history pertinent to resolution of this question, we note that throughout the debates on section 2 of the Fourteenth Amendment, there seems to be a premise that the census would count inhabitants of the United States, and not individuals who did not reside in one of the states.[13] Accordingly, we entertain serious doubts as to the constitutionality of any legislation that would seek to include for apportionment purposes military personnel, DOD civilian employees, or their dependents, when such individuals live outside the United States. We therefore must oppose passage of this provision in H.R. 3814 at this time.

---

[10] (Cont.) Rec. 4372 (1940) (statement of Rep. Celler) ("If you want aliens out, you must amend the Constitution").

[11] See e.g., Testimony of David A. Strauss, Attorney-Adviser, Office of Legal Counsel, 1980 Census: Counting Illegal Aliens, Hearing on S. 2166 Before the Subcomm. on Energy, Nuclear Proliferation and Federal Services of the Senate Comm. on Governmental Affairs, 96th Cong., 2d Sess., at 98 (1980) (Hearing).

[12] See Memorandum of Points and Authorities in Support of Defendant's Motion to Dismiss the Action or, in the Alternative, for Summary Judgement and in Opposition to Plaintiff's Application for a Preliminary Injunction, filed in Federation for American Immigration Reform v. Klutznick, 486 F. Supp. 564, 576-77 (D.D.C.) (3-judge court) (FAIR), appeal dismissed, 447 U.S. 916 (1980). The Memorandum is reprinted in the Hearings, supra note 11, at 128. The FAIR court endorsed the government's position in dictum. See 486 F. Supp. at 576-77 (reading section 2 to include all aliens) (dictum).

[13] The Department of Commerce advises that the Census Bureau has never counted for apportionment purposes U.S. Ambassadors, military personnel or State Department personnel stationed abroad. The Bureau's practice is based upon the concept of usual residence, which historically has been defined as where a person

The Office of Management and Budget has advised this Department that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

Jack E. Parkins for

Thomas M. Boyd
Acting Assistant Attorney General

Exhibit D

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[13] (Cont.) lives and sleeps most of the time.

POSSIBLE 1990 APPORTIONMENTS FOR MASSACHUSETTS UNDER VARIOUS METHODS

	EXACT Q	ADAM	HARM	EQPR	WEBS	JEFF	HAM
Apportionment Population	10.532	10	10	10	11	11	11
Resident Population	10.549	10	10	11	11	11	11

EXACT Q = EXACT QUOTA (The integer and fraction of seats due a state given its population)
ADAM = ADAMS (SMALLEST DIVISORS) METHOD - Never used
HARM = DEAN (HARMONIC MEAN) METHOD - Never used
EQPR = EQUAL PROPORTIONS (HILL) METHOD - Used 1940-1990
WEBS = WEBSTER (MAJOR FRACTIONS) METHOD - Used 1840, 1880-1910, 1930
JEFF = JEFFERSON (GREATEST DIVISORS) METHOD - Used 1790-1830
HAM = HAMILTON/VINTON METHOD - Used 1850-1870

Supreme Court, U.S.
FILED
MAR 25 1992
OFFICE OF THE CLERK

No. 91-1502

In the Supreme Court of the United States

OCTOBER TERM, 1991

BARBARA FRANKLIN, SECRETARY OF COMMERCE, ET AL., APPELLANTS

v.

COMMONWEALTH OF MASSACHUSETTS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

JOINT APPENDIX

SCOTT HARSHBARGER
Attorney General
DWIGHT GOLANN
STEVE BERENSON
Assistant Attorneys General
JOHN P. DRISCOLL
EDWARD P. LEIBENSPERGER
NEIL P. MOTENKO
Special Assistant Attorneys General
One Ashburton Place
Room 2019
Boston, Massachusetts 02108
(617) 727-2200

KENNETH W. STARR
Solicitor General
STUART M. GERSON
Assistant Attorney General
JOHN G. ROBERTS, JR.
Deputy Solicitor General
EDWIN S. KNEEDLER
Assistant to the Solicitor General
MICHAEL JAY SINGER
MARK B. STERN
LORI M. BERANEK
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

Notice of Appeal Filed: March 16, 1992
Appeal Docketed: March 18, 1992
Probable Jurisdiction Noted: March 20, 1992

EDITOR'S NOTE

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DISTRICT COURT DOCKET ENTRIES

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 91-11234-WD

COMMONWEALTH OF MASSACHUSETTS, EDWARD F. BERLIN AND KAREN J. KEPLER, PLAINTIFFS,

v.

ROBERT MOSBACHER, AS SECRETARY OF THE UNITED STATES DEPARTMENT OF COMMERCE; MICHAEL DARBY, AS UNDERSECRETARY OF ECONOMIC AFFAIRS OF THE UNITED STATES DEPARTMENT OF COMMERCE; THE BUREAU OF THE CENSUS; BARBARA BRYANT, AS DIRECTOR OF THE BUREAU OF THE CENSUS; GEORGE HERBERT WALKER BUSH, AS PRESIDENT OF THE UNITED STATES; AND DONNALD K. ANDERSON, AS CLERK OF THE UNITED STATES HOUSE OF REPRESENTATIVES, DEFENDANTS.

Bownes, *Senior Circuit Judge*
Boyle, *District Judge*
Woodlock, *District Judge*

DOCKET ENTRIES

DATE	NR	PROCEEDINGS
5/1/9 .	1	Complant filed (bdb) [Entry date 05/02/91]

DATE	NR	PROCEEDINGS
5/1/91	–	Filing Fee Paid. Receipt #: 09257 Amount: 120.00. (bdb) [Entry date 05/02/91]
5/1/91	–	Summons(es) issued for Robert Mosbacher, Michael Darby, Bureau of the Census, Barbara Bryant, George Herbert Walker Bush, Donnald K. Anderson (bdb) [Entry date 05/02/91]
5/20/91	3	Notice of attorney appearance for Robert Mosbacher, Michael Darby, Bureau of the Census, Barbara Bryant, George Herbert Walker Bush by Judith S. Yogman, Sandra M. Schraibman (cmg) [Entry date 06/03/91]
5/24/91	2	Motion by Commonwealth of Mass, Edward F. Berlin, Karen J. Kepler For Rule 16b Conference, FILED. (c/s) (cmg) [Entry date 06/03/91]
5/31/91	4	Response by Robert Mosbacher, Michael Darby, Bureau of the Census, Barbara Bryant, George Herbert Walker Bush, Donald K. Anderson to [2-1] motion For Rule 16b Conference, FILED. (c/s) (cmg) [Entry date 06/03/91]
6/7/91	–	Judge Douglas P. Woodlock. Endorsed Order granting [2-1] motion For Rule 16b Conference . . . ALLOWED to the extent the clerk shall set down such a conference in the beginning

DATE	NR	PROCEEDINGS
		of August by which time the Court anticipates the parties will have evaluated the Secretary of Commerce's decision as mandated in the City of New York litigation and will have met and worked toward a proposed scheduling order and a stipulation of Facts, FILED. (cc/cl) (cmg)
6/7/91	–	Judge Douglas P. Woodlock. Endorsed Order granting [2-1] motion For Rule 16b Conference. . . Counsel appear for a Rule 16b conf on 8/8/91 at 2:30 p.m., FILED. (cc/cl) set status conference for 2:30 8/8/91 before Judge Douglas P. Woodlock (cmg) [Entry date 06/11/91]
6/10/91	5	Motion by the State of Washington to Appear Amicus, FILED. (c/s) (cmg)
6/10/91	6	Memorandum in support of [5-1] motion to Appear Amicus FILED. (c/s) (cmg)
6/10/91	7	Motion for James M. Johnson, Sr. to appear pro hac vice, FILED. (c/s) (cmg)
6/10/91	8	Certificate of Good Standing by Attorney James M. Johnson, FILED. (c/s) (cmg)
6/14/91	9	Affidavit of Service by Mail of Motion for Leave to Appear, et al on counsel for all parties. FILED. (cmg)

DATE	NR	PROCEEDINGS
6/24/91	11	Ltr. to Clerk from Atty. Murphy confirming resched. of Rule 16b conf to 8/16/91 at 2:30 p.m., FILED. (c/s) (cmg) [Entry date 07/16/91]
6/26/91	13	STIPULATION by Robert Mosbacher, Michael Darby, Bureau of the Census, Barbara Bryant, George Herbert Walker Bush, Donnald K. Anderson extending time for defts to respond to Document requests until 8/19/91, FILED. (cmg) [Entry date 08/01/9]
6/28/91	10	Motion by Robert Mosbacher, Michael Darby, Bureau of the Census, Barbara Bryant, George Herbert Walker Bush, Donnald K. Anderson to extend time to respond to Complaint for 30 days, FILED. (assented to) cmg) [Entry date 07/01/9]
7/22/91	12	Notice of Hearing: reset miscellaneous hearing Re: Rule 16B Conference on 8/27/91 at 2:15 before Judge Douglas P. Woodlock. cc/cl. (cpp) [Entry date 07/24/91]
8/5/91	14	Answer to Complaint by Robert Mosbacher, Michael Darby Barbara Bryant, George Herbert Walker Bush, FILED. (c/s) (cmg) [Entry date 08/09/91]
8/14/91	–	Judge Douglas P. Woodlock. Endorsed Order granting [5-1] motion to Appear Amicus for the State of Washington, FILED. (cc/cl) [Entry date 08/20/91]

DATE	NR	PROCEEDINGS
8/14/91	–	Judge Douglas P. Woodlock. Endorsed Order granting [7-1] motion for James M. Johnson, Sr. to appear pro hac vice (cmg) [Entry date 09/03/91]
8/22/91	15	STIPULATION by Commonwealth of Mass, Edward F. Berlin, Karen J. Kepler, Robert Mosbacher, Michael Darby, Bureau of the Census, Barbara Bryant, George Herbert Walker Bush, Donnald K. Anderson, Washington, State of extending time for executive Branch defts to serve discovery until 8/26/91, FILED. (cmg) [Entry date 09/30/91]
8/27/91	–	Status conference held (cmg) [Entry date 09/03/91]
8/27/91	16	Judge Douglas P. Woodlock. Clerk's Notes:, set discovery due for 10/4/91, set motion filing (of cross motions for S/J) deadline for 10/18/91, Response to motion due by 11/1/91; replies by 11/8/91. Briefs from Montana case to be submitted as soon as possible. Formal positions of the parties re: Three judge Court and oversee Military claim by 9/13/91. Parties to also inform Court of critical dates in other litigation by 9/13/91, FILED. (cmg) [Entry date 09/03/91]
8/29/91	17	Notice of filing by George Herbert Walker Bush, Donnald K. Anderson the administrative record prepared in

DATE	NR	PROCEEDINGS
		connection with the decision to include overseas federal military and civilian emploees and their dependents in the 1990 census apportionment counts, FILED. (cmg) [Entry date 09/03/91]
8/30/91	18	STIPULATION by George Herbert Walker Bush, Donnald K. Anderson, extending time to resply to ps' first req. for documents and request to Admit facts to 9/11/91, FILED. (assented to) (cmg) [Entry date 09/03/91]
8/30/91	19	Notice of filing by George Herbert Bush, Donnald K. Anderson of briefs filed in State of Montana, et al v. United States Dept. of Commerce, et al, C.A. No. CV 91-22-H-CCL, Filed. (c/s) (cmg) [Entry date 09/03/91]
9/13/91	20	Motion by George Herbert Walker Bush, Donnald K. Anderson for leave to file brief in excess to Judge Douglas P. Woodlock, FILED. (unopposed) (cmg) [Entry date 09/16/91]
9/13/91	21	Memorandum by Barbara Bryant, George Herbert Walker Bush, Donnald K. Anderson in support of its

DATE	NR	PROCEEDINGS
		Position on Three-Judge Court, FILED. (c/s) (cmg) [Entry date 09/16/91]
9/13/91	22	Motion by Commonwealth of Mass, Edward F. Berlin, Karen J. Kepler For Adjudication by Three-Judge Court to Judge Douglas P. Woodlock, FILED. (c/s) (cmg) [Entry date 09/16/91]
9/13/91	23	Memorandum by Commonwealth of Mass, Edward F. Berlin, Karen J. Kepler in support of [22-1] motion For Adjudication by Three-Judge Court, FILED. (c/s) (cmg) [Entry date 09/16/91]
9/16/91	24	STIPULATION by Commonwealth of Mass, Edward F. Berlin, Karen J. Kepler, Robert Mosbacher, Michael Darby, Bureau of the Census, Barbara Bryant, George Herbert Walker Bush, Donnald K. Anderson, Washington, State of extending time for Executive Branch Defts to reply to discovery to 9/25/91, FILED. (cmg) [Entry date 09/20/91]
9/24/91	–	Terminated document(s) mooting [10-1] motion to extend time to respond to Complaint for 30 days, Filed. (assented to) Requested by biq. (lt)

DATE	NR	PROCEEDINGS
9/24/91	25	STIPULATION by Commonwealth of Mass, George Herbert Walker Bush, Donnald K. Anderson, to extend time to respond to Disc. to 9/23/91, FILED. (cmg) [Entry date 10/07/91]
10/4/91	30	STIPULATION by Commonwealth of Mass, Barbara Bryant, George Herbert Walker Bush extending time for response to disc. to 10/4/91, FILED. (cmg) [Entry date 11/01/91]
10/8/91	31	STIPULATION by Barbara Bryant, George Herbert Walker Bush extending time to 10/11/92 for disc. (cmg) [Entry date 11/01/91]
10/9/91	32	Judge Douglas P. Woodlock. Clerk's Notes: phone conference held re case status. Memorandum and Order to be issued regarding three-judge court. Briefs to be filed by 11/1/91, oppos. by 11/15/91; replies (if necessary) by 11/22/91, FILED. (cmg) [Entry date 11/01/91]
10/15/91	26	Judge Douglas P. Woodlock. Scheduling Memorandum and Order In Connection With the Convening of a Three-Judge Court ISSUED: P's submission to be filed by 11/1/91; deft's submissions by 11/15/91 set scheduling order deadlines: Status conference on 9:30 12/6/91, FILED. (cc/cl) (cmg) [Entry date 10/17/91]

DATE	NR	PROCEEDINGS
10/17/91	27	STIPULATION by Commonwealth of Mass, George Herbert Walker Bush, Donnald K. Anderson, extending time to respond to disc. to 10/18/91, FILED. (c/s) (cmg) [Entry date 10/22/91]
10/23/91	28	STIPULATION by Commonwealth of Mass, Barbara Bryant, George Herbert Walker Bush, extending time to respond to disc. to 10/23/91, FILED. (cmg) [Entry date 10/28/91]
10/23/91	33	Judge Douglas P. Woodlock. Clerk's Notes: Phone conf held. Sscheduling order to be modified. Verbal Motion to stay apportionment claims DENIED. Montana decision to be filed with the Court today. Parties instrucsted [sic] to file copies of all filings made with the Supreme Court in this case. Copies should also be delivered to Judge Bownes and Boyle, FILED. (cmg) [Entry date 11/01/91]
10/24/91	34	Judge Douglas P. Woodlock. Scheduling Order setting Deadline for filing of all dispositive motions 11/5/91, responsive submissions 11/15/91, Reply submissions 11/22/91, FILED. (cc/cl) (cmg) [Entry date 11/04/91]
10/24/91	36	Ltr. to Judge Woodlock from counsel for defts requesting Court modify its Oct. 15, 1991 Memorandum, FILED. (c/s) (cmg) [Entry date 11/04/91]

DATE	NR	PROCEEDINGS
10/28/91	29	Notice of filing by Barbara Bryant, George Herbert Walker Bush, Donnald K. Anderson the three-judge court's decision (along with the dissent) in State of Montana v. U.S. Dept of Commerce CA no. 91-22-H-CCL, FILED. (c/s) (cmg)
10/31/91	37	STIPULATION by Commonwealth of Mass, Barbara Bryant, George Herbert Walker Bush extending time to respond to P's disc. requests to 10/30/91, FILED. (cmg) [Entry date 11/04/91]
11/1/91	35	Copy of Judgment and Permanent Inunction entered in District of Montana in State of Montana v. U.S. Department of Commerce, FILED. (cmg) [Entry date 11/04/91]
11/5/91	38	Motion by Michael Darby, Bureau of the Census, Barbara Bryant, George Herbert Walker Bush for judgment on the pleadings, FILED. (c/s) (cmg)
11/5/91	39	Motion by Michael Darby, Bureau of the Census, Barbara Bryant, George Herbert Walker Bush for summary judgment FILED. (c/s) (cmg)
11/5/91	40	Motion by Michael Darby, Bureau of the Census, Barbara Bryant, George Herbert Walker Bush TO Dissolve Three-Judge Court, FILED. (c/s) (cmg)

DATE	NR	PROCEEDINGS
11/5/91	41	Motion by Michael Darby, Bureau of the Census, Barbara Bryant, George Herbert Walker Bush for leave to file brief in excess, FILED. (unopposed) (cmg)
11/5/91	42	Motion by Michael Darby, Bureau of the Census, Barbara Bryant, George Herbert Walker Bush in support of [40-1] motion TO Dissolve Three-Judge Court, [39-1] motion for summary judgment, [38-1] motion for judgment on the pleadings, FILED. (c/s) (cmg)
11/5/91	45	Proposed Findings of fact and conclusions of law by Commonwealth of Mass, Edward F. Berlin, Karen J. Kepler, Robert Mosbacher, Michael Darby, Bureau of the Census, Barbara Bryant, George Herbert Walker Bush, Donnald K. Anderson, Washington, State of, FILED. (c/s) (cmg) [Entry date 11/07/91]
11/5/91	46	Motion by Commonwealth of Mass, Edward F. Berlin, Karen J. Kepler for summary judgment, FILED. (c/s) (cmg) [Entry date 11/07/91]
11/5/91	47	Motion by Commonwealth of Mass, Edward F. Berlin, Karen J. Kepler for leave to file Telefaxed Affidavit (cmg) [Entry date 11/07/91]
11/5/91	48	Affidavit of Jeffrey L. Levy, FILED. (c/s) (cmg) [Entry date 11/07/91]

DATE	NR	PROCEEDINGS
11/5/91	49	STIPULATION by Commonwealth of Mass, Edward F. Berlin, Karen J. Kepler to file brief in excess of twenty-page limit, FILED. (cmg) [Entry date 11/07/91]
11/5/91	50	Memorandum by Commonwealth of Mass, Edward F. Berlin, Karen J. Kepler in support of [46-1] motion for summary judgment (cmg) [Entry date 11/07/91]
11/6/91	43	Motion by Commonwealth of Mass, Edward F. Berlin, Karen J. Kepler for leave to file Original Affidavit of Previously Filed Telefaxed Affidavit One Day Late, FILED. (c/s) (cmg) [Entry date 11/07/91]
11/6/91	44	(Original) Affidavit of H. Peyton Young, FILED. (c/s) (cmg) [Entry date 11/07/91]
11/8/91	–	Judge Douglas P. Woodlock. Endorsed Order granting [43-1] motion for leave to file Original Affidavit of Previously Filed Telefaxed Affidavit One Day Late, FILED. (cc/cl) (cmg) [Entry date 11/14/91]
11/15/91	51	STIPULATION by Commonwealth of Mass, for leave to file in excess of twenty page limit, FILED. (cmg) [Entry date 11/19/91]
11/15/91	52	Memorandum by Commonwealth of Mass, Edward F. Berlin, Karen J. Kepler in opposition to [39-1] motion for summary judgment, FILED. (c/s) (cmg) [Entry date 11/19/91]

DATE	NR	PROCEEDINGS
11/15/91	53	Motion by Commonwealth of Mass, Edward F. Berlin, Karen J. Kepler for leave to file Telefaxed Affidavit, FILED. (c/s) (cmg) [Entry date 11/19/91]
11/15/91	54	Supplemental Affidavit of H. Peyton Young Re: [52-1] opposition memorandum, FILED. (c/s) (cmg) [Entry date 11/19/91]
11/15/91	55	STIPULATION by Barbara Bryant, George Herbert Walker Bush, Donnald K. Anderson, for leave to file Brief in excess, FILED. (cmg) [Entry date 11/19/91]
11/15/91	56	Response by Barbara Bryant, George Herbert Walker Bush, Donnald K. Anderson in opposition to [46-1] motion for summary judgment, FILED. (c/s) (cmg) [Entry date 11/19/91]
11/15/91	57	Memorandum by Washington, State of in support of [39-1] motion for summary judgment, [38-1] motion for judgment on the pleadings, FILED. (c/s) (cmg) [Entry date 11/19/91]
11/20/91	64	Motion by Commonwealth of Mass for leave to file Original of Previously Faxed Affidavit, FILED. (c/s) (cmg) [Entry date 12/03/91]
11/22/91	58	Reply by Barbara Bryant, George Herbert Walker Bush, Donnald K. Anderson to resonse to [39-1] motion for summary judgment, FILED. (c/s) (cmg) [Entry date 11/25/91]

DATE	NR	PROCEEDINGS
11/22/91	59	Motion by Commonwealth of Mass to strike [57-1] support memorandum, FILED. (c/s) (cmg) [Entry date 11/26/91]
11/22/91	60	Motion by Commonwealth of Mass, Edward F. Berlin, Karen J. Kepler for leave to file Telefaxed Affidavit, FILED. (c/s) (cmg) [Entry date 11/26/91]
11/22/91	61	Telefaxed Second Supplemental Affidavit of H. Peyton Young Re: [46-1] motion for summary judgment, FILED. (c/s) (cmg) [Entry date 11/26/91]
11/22/91	62	Reply by Commonwealth of Mass, Edward F. Berlin, Karen J. Kepler to response to [46-1] motion for summary judgment FILED. (c/s) (cmg) [Entry date 11/26/91]
11/25/91	65	Motion by Commonwealth of Mass for leave to file Original of Previously Telefaxed Affidavit Second Supplemental Affidavit of H. Peyton Young, FILED. (c/s) (cmg) [Entry date 12/03/91]
11/29/91	63	Notice of filing by Barbara Bryant, George Herbert Walker Bush, Donnald K. Anderson Petition for a Writ of Certiorari Before Judgment to the U.S. Court of Appeals for the Ninth Circuit in State of Montana, et al v.

DATE	NR	PROCEEDINGS
		U.S. Dept. of Commerce CA 91-22-H-CCL filed w/Supreme Court on 11/26/91, FILESD. (cmg) [Entry date 12/02/91]
12/23/91	66	Notice of Change of Address for Aatty. Mark H. Murphy, counsel for Defts Mosbacher, Darby, Bureau of Census, B. Bryant, and George Herbert Walker Bush, FILED. (c/s) (cmg) [Entry date 01/09/92]
1/10/92	67	Transcript of Hearing held on 12/6/91, FILED. (cmg)
1/23/92	68	Notice of filing by Barbara Bryant, George Herbert Walker Bush, Donnald K. Anderson Brief for Appellants filed with the Supreme Court on 1/15/92 in State of Montana v. U.S. Dept. of Commerce, et al. FILED. (c/s) (cmg)
2/6/92	69	Notice of attorney appearance for Barbara Bryant, George Herbert Walker Bush, Donnald K. Anderson by Susan Korytkowski, to be substituted for Mark H. Murphy, Esq., FILED. (biq)
2/6/92	70	Notice of filing by Bureau of the Census, Barbara Bryant, George Herbert Walker Bush, Donnald K. Anderson Brief of the State of Washington as Amicus in Support of Appellants dated 1/15/92 in Montana v. U.S. Dept. of Commerce, FILED. (c/s) (biq) [Edit date 02/06/92]

DATE	NR	PROCEEDINGS
2/19/92	71	Notice of filing by Barbara Bryant, George Herbert Walker Bush, Donnald K. Anderson of Copy of Brief of Appellees in U.S. Dept. of Commerce v. Montana, FILED. (c/s) (cmg) [Entry date 02/20/92]
2/20/92	72	Three-Judge panel Opinion ISSUED: Senior Circuit Judge Bownes, District Judge Boyle, District Judge Woodlock: Defts' Motion for S/J as to the apportionment claim and Ps' Motion for S/J as to the overseas census claim grounded upon a violation of the Administrative Procedure Act are ALLOWED. A set of final decrees and orders reflecting this judgment shall issue, FILED. (cc/cl) (cmg) [Entry date 02/24/92]
2/20/92	73	Three-Judge panel Final Decrees and Orders ISSUED, FILED. (cc/cl) (cmg) [Entry date 02/24/92]
2/20/92	–	Case closed (heb) [Entry date 02/28/92]
3/6/92	74	Unopposed Motion by Robert Mosbacher, Michael Darby, Bureau of the Census, Barbara Bryant, George Herbert Walker Bush, Donnald K. Anderson for leave to file Brief in excess of 20 pages, FILED, (c/s) (heb)
3/6/92	75	Motion by Robert Mosbacher, Michael Darby, Bureau of the Census, Barbara Bryant, George Herbert Walker Bush, Donnald K. Anderson for reconsideration of [73-1] order, FILED. (c/s) (heb)

DATE	NR	PROCEEDINGS
3/6/92	76	Motion by Robert Mosbacher, Michael Darby, Bureau of the Census, Barbara Bryant, George Herbert Walker Bush, Donnald K. Anderson to stay Final Decrees and Orders relating to inclusion of overseas federal personnel in apportionment counts pending ruling on dfts' motion for reconsideration or pending appeal, FILED. (c/s) (heb)
3/6/92	77	Memorandum by Robert Mosbacher, Michael Darby, Bureau of the Census, Barbara Bryant, George Herbert Walker Bush, Donnald K. Anderson in support of [76-1] motion to stay Final Decrees and Orders relating to inclusion of overseas federal personnel in apportionment counts, [75-1] motion for reconsideration of [73-1] order, FILED. (c/s) (heb)
3/9/92	78	Motion by Commonwealth of Mass, Edward F. Berlin, Karen J. Kepler to strike post-judgment "declarations"; FILED. (c/s) (heb) [Entry date 03/10/92]
3/9/92	79	Affidavit of Craig Stafford Re: [78-1] motion to strike post-judgment "declarations," FILED. (c/s) (heb) [Entry date 03/10/92]
3/10/92	80	Response by Commonwealth of Mass, Edward F. Berlin, Karen J. Kepler in opposition to [75-1] motion for reconsideration of [73-1] order, FILED. (c/s) (heb)

DATE	NR	PROCEEDINGS
3/10/92	81	Response by Commonwealth of Mass, Edward F. Berlin, Karen J. Kepler in opposition to [76-1] motion to stay Final Decrees and Orders relating to inclusion of overseas federal personnel in apportionment counts, FILED.(c/s) (heb)
3/10/92	82	Affidavit of William P. Lee Re: [80-1] opposition response, FILED. (c/s) (heb)
3/13/92	83	Memorandum by Robert Mosbacher, Michael Darby, Bureau of the Census, Barbara Bryant, George Herbert Walker Bush, Donnald K. Anderson in opposition to [78-1] motion to strike post-judgment "declarations" [heb)
3/13/92	84	Certification of the Commonwealth of MA, FILED. (c/s) (heb)
3/13/92	85	Judge Douglas P. Woodlock. Order granting [78-1] motion to strike post-judgment "declarations" denying [76-1] motion to stay Final Decrees and Orders relating to inclusion of overseas federal personnel in apportionment counts, denying [75-1] motion for reconsideration of [73-1] order, ISSUED. (cc/cl) (heb) [Entry date 03/16/92]
3/16/92	86	Notice of appeal to Supreme Court by Bureau of the Census, Barbara Bryant, George Herbert Walker

DATE	NR	PROCEEDINGS
		Bush, Barbara Hackman Franklin, and Mark W. Plant from the Final Decrees and Orders dated 2/20/92 and the Orders of 3/13/92. Filed. Notice sent to counsel of record. (kmn) [Entry date 03/17/92]
3/16/92	87	Notice of appeal by Bureau of the Census, Barbara Bryant, George Herbert Walker Bush, Barbara Hackman Franklin, and Mark W. Plant, Appeal record due on 4/15/92, filed. Notice sent to counsel. (kmn) [Entry date 03/17/92]
3/16/92	88	Certificate of service by Bureau of the Census, Barbara Bryant, George Herbert Walker Bush, Barbara Hackman Franklin, and Mark W. Plant as to the notices of appeal. (kmn) [Entry date 03/17/92]
3/17/92	–	Certified copy of docket, Notice of Appeal, Opinion and Final Decrees and Orders forwarded to United States Supreme Court on this date. (kmn)

COMPLAINT

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO.:

COMMONWEALTH OF MASSACHUSETTS, EDWARD F. BERLIN AND KAREN J. KEPLER, PLAINTIFFS,

v.

ROBERT MOSBACHER, AS SECRETARY OF THE UNITED STATES DEPARTMENT OF COMMERCE; MICHAEL DARBY, AS UNDERSECRETARY OF ECONOMIC AFFAIRS OF THE UNITED STATES DEPARTMENT OF COMMERCE; THE BUREAU OF THE CENSUS; BARBARA BRYANT, AS DIRECTOR OF THE BUREAU OF THE CENSUS; GEORGE HERBERT WALKER BUSH, AS PRESIDENT OF THE UNITED STATES; AND DONNALD K. ANDERSON, AS CLERK OF THE UNITED STATES HOUSE OF REPRESENTATIVES, DEFENDANTS.

PRELIMINARY STATEMENT

1. This is an action by the Commonwealth of Massachusetts and individual citizens and voters in the Commonwealth seeking relief from the unconstitutional elimination of a Massachusetts seat in the United States House of Representatives as a result of the 1990 Decennial Census.

2. The Commonwealth has received official notice that the number of congressional seats allocated to the citizens of Massachusetts will be reduced from eleven to

ten. This will also reduce Massachusetts' Electoral College votes in future presidential elections. If this is allowed to occur, plaintiffs will be deprived of their proper, fair and proportionate representation in Congress, in violation of their rights under the United States Constitution.

3. Specifically, plaintiffs will demonstrate that defendants (a) counted federal employees who were residing abroad on the date of the 1990 Census as if they were residents of individual states, in violation of the constitutional mandate to apportion representatives in Congress according to the number of persons "in each State"; (b) apportioned such overseas federal employees using a standard that was inconsistent with the Census Bureau's historical practice and with the rule applied by the Bureau to count persons within the fifty states; and (c) pursuant to federal statute applied a mathematical formula to apportion seats in the House of Representatives, designated as the equal proportions method (otherwise known as the "Hill-Huntington method"), which is systematically biased in favor of less populated states and, thus, violates the constitutional principle of "one person, one vote". As a direct result of these violations, one less seat in Congress will be allocated to Massachusetts.

JURISDICTION

4. This action arises under Article I, Section 2 of the U.S. Constitution, the Fifth Amendment and Section 2 of the Fourteenth Amendment, the laws of the United States relating to the taking of the census and to the apportionment of representatives, 2 U.S.C. § 2a, 13 U.S.C. § 141, and the Administrative Procedures Act, 5 U.S.C. § 701, *et seq.*

5. Jurisdiction over this action is based upon 28 U.S.C. § 1331 (federal question jurisdiction) and 28

U.S.C. § 1361 (mandamus). Declaratory relief is authorized by 28 U.S.C. §§ 2201, 2202. Venue is proper in this district pursuant to 28 U.S.C. § 1391(e).

PARTIES

6. Plaintiff Commonwealth of Massachusetts is a sovereign state of the United States. The Commonwealth is entitled to a number of Representatives in Congress pursuant to Article I, Section 2, Clause 3 of the Constitution, as amended by section 2 of the Fourteenth Amendment, apportioned on the basis of "the whole number of persons in" the state.

7. Plaintiff Edward F. Berlin is a citizen of the United States and a registered voter in the Commonwealth of Massachusetts, residing in Greenfield, Massachusetts, which is presently a part of the 1st Congressional District.

8. Plaintiff Karen J. Kepler is a citizen of the United States and a registered voter in the Commonwealth of Massachusetts, residing in Brookline, Massachusetts, which is presently a part of the 4th Congressional District.

9. Defendant Robert Mosbacher is the Secretary of the United States Department of Commerce and in that capacity is responsible for the administration of the Department, including the defendant Bureau of the Census.

10. Defendant Michael Darby is the Undersecretary for Economic Affairs of the United States Department of Commerce, and is responsible for overseeing the Director of the Bureau of the Census.

11. Defendant Barbara Bryant is the Director of the defendant Bureau of the Census of the United States Department of Commerce.

12. Defendant George Herbert Walker Bush is the President of the United States.

13. Defendant Donnald K. Anderson is the Clerk of the United States House of Representatives.

STATUTORY FRAMEWORK

14. Article I, Section 2 of the Constitution, as amended by Section 2 of the Fourteenth Amendment, requires that the House of Representatives be chosen "by the People of the several States" and that each state receive a number of Representatives in proportion to "the whole number of persons in each State."

15. Pursuant to 13 U.S.C. § 141, defendant Mosbacher was responsible for conducting the Decennial Census in 1990 and for reporting the "total population by states" to the President by December 31, 1990.

16. Pursuant to 2 U.S.C. § 2a, the President was responsible for transmitting to the Congress a statement showing "the whole number of persons in each state . . . as ascertained under" the census, and the number of members of the House of Representatives to which each state is entitled under a mathematical formula. The Clerk of the House of Representatives thereafter was responsible for transmitting to the Governor of each state a certificate showing the number of Representatives that such state may elect to Congress.

17. The President transmitted the statement to the Congress in January 1991. On January 16, 1991 the Clerk of the House of Representatives transmitted to Governor William Weld of Massachusetts a certificate stating that, as a result of the census tabulations preprared by defendants and the current mathematical apportionment method, Massachusetts will lose one of its eleven congressional seats.

18. Pursuant to 13 U.S.C. § 141(c), defendants Mosbacher, Darby and Bryant are required to prepare and

certify tabulations of the populations of each state, broken down by cities and other governmental units. The Commonwealth must use the census tabulations prepared by the defendants for the purpose of apportioning districts within the Commonwealth for Representatives in Congress.

STATEMENT OF FACTS

Counting of Federal Overseas Employees

The "Usual Residence" Rule

19. The Constitution requires that Representatives in Congress be apportioned among the States according to "the whole number of persons in each State," as determined by the most recent decennial census. Article I, Section 2, U.S. Constitution, as amended by Section 2 of the Fourteenth Amendment.

20. In accordance with the Constitution, the federal census has, since the founding of the United States, counted persons according to their "usual place of abode" or "usual residence." Beginning with the 1790 Census, federal authorities have consistently counted all persons, except travelers occasionally absent from their abode, at the place where they were living and sleeping on the date of the census.

Conduct of the 1990 Census

21. In 1990, rules of the Census Bureau mandated the use of the "usual residence" in conducting the census.

22. In conducting the 1990 Census, the Census Bureau in fact applied the "usual residence" rule to count persons in all of the fifty states according to where they were usuallly living and sleeping as of April 1, 1990.

23. For example, consistent with its rules and historical practice, the Census Bureau counted college students at the institutions where they were enrolled on April 1, 1990, rather than where they lived during vacations or where their family homes were located. The Bureau also counted prison inmates, residents of chronic care hospitals, and other institutionalized persons in the institutions where they were living and sleeping on April 1, rather than where they had lived before commitment or where they intended to reside after release.

24. The Census Bureau also applied the "usual residence" rule to count soldiers and other federal employees based in the United States according to where they were usually living and sleeping as of the 1990 Census date.

25. In conducting the 1990 Census, the Census Bureau did not, however, count federal employees living in foreign countries according to the "usual residence" rule. Instead, the Census Bureau apportioned federal employees and their dependents who were living abroad on the census date to states according to the "home of record" which the employee had listed upon entering government service.

26. An overseas federal employee's "home of record" may or may not be the place where that person intends to live when he or she returns to the United States. In particular, federal military employees are required to designate a "home of record" when they enlist, and are not permitted to change their designated home of record during their term of service, regardless of their actual or intended residence or domicile.

27. The "home of record" method used by the Census Bureau to apportion overseas federal employees was thus patently inconsistent with the "usual residence" rule that

the Bureau used to apportion all other persons in the 1990 Census in that such method did not identify where those employees were usually residing on the 1990 Census date.

28. As a direct result of the Census Bureau's decision to apportion federal employees and their dependents who were living in foreign countries on the date of the 1990 Census to states in which they were not then residing, the Commonwealth of Massachusetts will lose one seat in the House of Representatives, and will suffer a reduction in its Electoral College votes in future presidential elections.

The Constitution and Census Practice

29. The Census Bureau's 1990 decision not to count federal employees living overseas according to its "usual residence" rule violated the express mandate of the Constitution and nearly two hundred years of consistent federal practice in conducting the Census.

30. The First Congress, which included among its members many of the Framers of the Constitution, adopted the First Decennial Census Act of 1790 to govern the taking of the census. That Act specified that persons should be counted and apportioned at their "usual place of abode" on the date of the census. In the 1790 Census, persons residing abroad or in the Territories of the United States were not apportioned to any state for purposes of congressional representation.

31. During the censuses immediately following the ratification of the Constitution, and immediately following the adoption of the Fourteenth Amendment's mandate to apportion congressional representatives according to the number of persons "in each State," federal census enumerators counted for apportionment purposes only those persons who were physically residing in a state on the census date. Only once, in 1970, did a census count overseas employees for apportionment purposes.

32. In 1988-89, Congress considered legislation that would have required the Census Bureau to count overseas federal employees in the 1990 Census according to their homes of record. Defendant Department of Commerce formally opposed the enactment of this legislation.

33. In September 1988, through its General Counsel, the Department of Commerce informed Congress that "The Department of Justice advises that it has doubts about the constitutionality of any legislation that would seek to include for apportionment purposes military personnel, Federal civilian employees, or their dependents, when such individuals live outside the United States." The Department of Commerce also advised Congress that "The Administration believes that the concept of 'usual residence,' where a person lives and sleeps most of the time, is the appropriate basis for deciding who should be counted in the census." A true and accurate copy of the Department's statement to Congress appears as Exhibit A to this Complaint.

34. Congress did not enact any legislation concerning the method of counting overseas federal employees or their dependents for congressional apportionment purposes in the 1990 Census.

The Apportionment Formula

35. Article 1, Section 2, Clause 3 of the Constitution as modified by Section 2 of the Fourteenth Amendment requires that "Representatives . . . shall be apportioned among the several States . . . according to their respective Numbers."

36. Apportionment among the states means that congressional district boundaries cannot cross state lines. In addition, the Constitution requires that every state must have at least one Representative and a congressional

district cannot include less than 30,000 people. Taking into account these constitutional requirements, the apportionment of the population into congressional districts must afford the citizens of the United States, including plaintiffs, equal and fair representation as nearly as practicable.

37. By dividing the national population by the total number of seats in the House of Representatives (435), a national-average-size congressional district is obtained. In 1990 the national-average-size congressional district was 572,466 persons. When the national average size district is divided into the population of a state, the mathematical result is that there is (except for the 3 smallest states) a whole number of congressional seats plus a fraction of a seat. Dividing the national-average-size district into the total population of a state will produce a number (for example, 4.37 or 10.53 or 6.85) of congressional seats. This number is generally referred to as the "House seat quota."

38. A state cannot have a "fraction of a Representative"; thus, the fractions of seats must be allocated among the states so that each state is apportioned a whole number of Representatives.

39. In the history of the United States several different mathematical methods have been used to allocate seats (including fractions of seats) in the House of Representatives among the states. Among such methods are the major fractions formula (known as the "Webster formula") and the method of equal proportions (known as the "Hill-Huntington formula").

40. In 1941 Congress passed an apportionment act (55 Stat. 761, codified at 2 U.S.C. § 2a) that, among other things, mandated the Hill-Huntington mathematical formula for allocating fractions of seats.

41. Subsequent experience, and modern mathematical analysis, demonstrate that the Hill-Huntington method is

systematically biased in favor of less populated states to the detriment of the other states. The bias inherent in the Hill-Huntington method violates the ideal of one person, one vote guaranteed by the Constitution.

42. The mathematical formula for apportionment known as the Webster method has no statistical bias toward either less or more populated states.

43. Pursuant to the 1990 Decennial Census, the apportionment of Representatives among the states resulted in a House seat quota for Massachusetts of 10.53 congressional seats.

44. Pursuant to the Hill-Huntington formula, Massachusetts is allocated ten congressional seats.

45. Pursuant to the Webster formula, Massachusetts is allocated eleven congressional seats.

46. Massachusetts will suffer a unique injury as a result of the bias inherent in the Hill-Huntington apportionment method. The use of that biased mathematical formula will cause Massachusetts to lose a congressional seat to a less populated state, and will reduce Massachusetts' Electoral College votes in future presidential elections. Such a result dilutes the votes of Massachusetts citizens to the benefit of others, thus depriving Massachusetts citizens of the constitutional guarantee of one person, one vote.

FIRST CLAIM FOR RELIEF – UNCONSTITUTIONAL APPORTIONMENT FORMULA

47. Plaintiffs incorporate by reference the allegation of paragraphs 1 to 46, above.

48. That portion of 2 U.S.C. § 2a that requires the apportionment of seats in the House of Representatives among the states by the method known as equal proportions (or Hill-Huntington) violates the constitutional prin-

ciple of one person, one vote as mandated by Article I, Section 2 and the Fifth Amendment of the United States Constitution.

49. As a direct result of the application of 2 U.S.C. § 2a by defendants to the 1990 Decennial Census, the number of seats in the House of Representatives allocated to Massachusetts will be unconstitutionally reduced from eleven to ten, and the Commonwealth will lose Electoral College votes in future presidential elections.

50. As a direct result of the application of 2 U.S.C. § 2a by defendants to the 1990 Decennial Census, the individual plaintiffs, citizens of Massachusetts, will be deprived of fair and equal representation guaranteed by the constitutional principle of one person, one vote.

SECOND CLAIM FOR RELIEF – CONSTITUTIONAL VIOLATION

51. Plaintiffs incorporate by reference the allegations of paragraphs 1 to 50, above.

52. Defendants' inclusion of overseas federal employees and their dependents in the 1990 Census for congressional apportionment purposes violates the requirement of Article I of the Constitution, as amended by the Fourteenth Amendment, that Representatives in Congress be apportioned among the states in proportion to "the whole number of persons in each State."

53. As a direct result of defendants' inclusion and apportionment of overseas federal employees and their dependents to particular states in the 1990 Census, Massachusetts will lose one of its seats in the House of Representatives, and the Commonwealth will lose Electoral College votes in future presidential elections.

54. As a direct result of defendants' inclusion and apportionment of overseas federal employees and their dependents to particular states in the 1990 Census, the individual plaintiffs, who are citizens of Massachusetts, will be deprived of fair and equal representation guaranteed by the constitutional principle of one person, one vote.

THIRD CLAIM FOR RELIEF – ADMINISTRATIVE PROCEDURE ACT

55. Plaintiffs incorporate by reference the allegations of paragraphs 1 to 54, above.

56. The Census Bureau's application of its "usual residence" rule to apportion persons in all the fifty States in the 1990 Census, but disregard of that rule and apportionment of federal employees and dependents living abroad to particular states, was arbitrary, capricious and in violation of the Administrative Procedure Act, 5 U.S.C. § 701, *et seq.*

57. As a direct result of defendants' counting overseas federal employees and their dependents for purposes of congressional apportionment in the 1990 Census, Massachusetts will lose one of its seats in the House of Representatives, and the Commonwealth will lose Electoral College votes in future presidential elections.

58. As a direct result of the defendants' inclusion of overseas federal employees and their dependents in the 1990 apportionment population, the individual plaintiffs, who are citizens of Massachusetts, will be deprived of fair and equal representation guaranteed by the constitutional principle of one person, one vote.

PRAYERS FOR RELIEF

59. WHEREFORE, plaintiffs seek judgment:

(a) Declaring unconstitutional so much of 2 U.S.C. § 2a as requires the apportionment of seats in the House of Representatives among the states by the method known as equal proportions;

(b) Ordering that the apportionment following the 1990 Decennial Census be accomplished pursuant to the mathematical formula that will guarantee, as nearly as practicable, the constitutional principle of one person, one vote;

(c) Declaring that the practice of counting overseas federal employees for the purpose of apportioning seats in the House of Representatives among the States was arbitrary, capricious, and contrary to law and the Constitution;

(d) Ordering that the apportionment of seats in the House of Representatives among the States following the 1990 Decennial Census be carried out based upon the numbers of persons who had a usual residence within a State as of the Census date; and

(e) Granting such other relief as the Court deems just and proper.

SCOTT HARSHBARGER
Attorney General of the
Commonwealth of Massachusetts

/s/ DWIGHT GOLANN
/s/ WILLIAM P. LEE
/s/ STEVEN BERENSON

Dwight Golann
BBO #196720
William P. Lee
BBO #549943
Steven Berenson
BBO #555765
Assistant Attorneys General
One Ashburton Place, Room 2019
Boston, Massachusetts 02108
(617) 727-2200

/s/ JOHN P. DRISCOLL, JR.
/s/ EDWARD P. LEIBENSPERGER
/s/ NEIL P. MOTENKO

John P. Driscoll, Jr.
BBO #135360
Edward P. Leibensperger
BBO #262620
Neil P. Motenko
BBO #358160
Special Assistant Attorneys
General
NUTTER, MCCLENNEN & FISH
One International Place
Boston, Massachusetts 02110
(617) 439-2000

DATED: May 1, 1991

EXHIBIT A

[SEAL]

GENERAL COUNSEL OF THE
UNITED STATES DEPARTMENT OF COMMERCE
Washington, D.C. 20230

Honorable William D. Ford
Chairman, Committee on Post Office
and Civil Service
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This is in response to your request for the views of this Department on H.R. 4720, a bill to amend title 13, United States Code, to require the Secretary of Commerce to include all Federal civilian and military personnel stationed overseas, and their dependents living overseas, in the census counts for apportionment.

The bill would require that "any member of any of the uniformed services . . ." and "any civilian employee of the United States who is absent from the United States as a result of having been assigned to a post of duty outside the United States, and any dependent of any such member who has left the United States in order to reside at or near such post" be included in the apportionment counts. It specifies that the place of residence for these persons "shall be considered to be the individual's last place of general abode within the United States for a period of 6 consecutive months or longer."

The Department opposes the enactment of H.R. 4720. The Administration believes that the concept of "usual residence," where a person lives and sleeps most of the

time, is the appropriate basis for deciding who should be counted in the census. Because no administrative records exist that include the necessary residence information or information about dependents, H.R. 4720 would require a complete census of all overseas Federal employees.

The Office of Personnel Management reports that 11 cabinet departments and 17 other Federal agencies had citizen employees in foreign countries as of January 1988. These employees were stationed in about 160 countries. Adding such a large and costly operation to the census this late in the decade gives the Census Bureau little time to plan, coordinate, and budget for this effort.

The Census Bureau and the Department of Defense (DOD) have agreed to conduct a census of overseas DOD employees and their dependents. The data collected under this agreement are for statistical purposes, not apportionment. The DOD has agreed to pay all the costs of censusing its overseas employees and their dependents. The DOD will distribute and collect census forms, using procedures specified by the Bureau of the Census. There is no comparable agreement with any of the 27 other agencies that have employees stationed overseas.

The Department of Justice advises that it has doubts about the constitutionality of any legislation that would seek to include for apportionment purposes military personnel, Federal civilian employees, or their dependents, when such individuals live outside the United States.

We have been advised by the Office of Management and Budget that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

/s/ ROBERT B. BRUMLEY

Robert B. Brumley
General Counsel

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ANSWER OF EXECUTIVE BRANCH DEFENDANTS

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 91-11234 WD

COMMONWEALTH OF MASSACHUSETTS, EDWARD F. BERLIN AND KAREN J. KEPLER, PLAINTIFFS,

v.

ROBERT MOSBACHER, AS SECRETARY OF THE UNITED STATES DEPARTMENT OF COMMERCE; MICHAEL DARBY, AS UNDERSECRETARY OF ECONOMIC AFFAIRS OF THE UNITED STATES DEPARTMENT OF COMMERCE; THE BUREAU OF THE CENSUS; BARBARA BRYANT, AS DIRECTOR OF THE BUREAU OF THE CENSUS; GEORGE HERBERT WALKER BUSH, AS PRESIDENT OF THE UNITED STATES; AND DONNALD K. ANDERSON, AS CLERK OF THE UNITED STATES HOUSE OF REPRESENTATIVES, DEFENDANTS.

EXECUTIVE BRANCH DEFENDANTS' ANSWER

Defendants Robert Mosbacher, Michael Darby, the Bureau of the Census, Barbara Bryant, and George Herbert Walker Bush, by and through their undersigned counsel, hereby answer plaintiffs' Complaint as follows:

FIRST DEFENSE

The Court lacks jurisdiction over the subject matter of this action.

SECOND DEFENSE

Plaintiffs' Complaint fails to establish standing to maintain this action.

THIRD DEFENSE

Plaintiffs have failed to state a claim upon which relief can be granted.

FOURTH DEFENSE

In response to the numbered paragraphs of the Complaint, Executive Branch defendants answer as follows:

1. Paragraph 1 contains plaintiffs' characterizations of their Complaint, as to which no response is required, but to the extent a response is required, denied.

2. Admit the first and second sentences. The third sentence contains conclusions of laws, as to which no response is required, but to the extent a response is required, denied.

3. Subsection (b) of Paragraph 3 is denied. The remainder of Paragraph 3 contains conclusions of law, as to which no response is required, but to the extent a response is required, denied.

4. Paragraph 4 contains plaintiffs' jurisdictional allegations, as to which no response is required, but to the extent a response is required, denied.

5. Paragraph 5 contains plaintiffs' jurisdictional allegations, as to which no response is required, but to the extent a response is required, denied.

6. Admit.

7. Defendants lack knowledge or information sufficient to form a belief as to the truth of Paragraph 7.

8. Defendants lack knowledge or information sufficient to form a belief as to the truth of Paragraph 8.

9. Admit.

10. Admit.

11. Admit.

12. Admit.

13. Admit.

14. Denied, except to admit that Article I, Section 2 of the Constitution contains the quoted material, and defendants refer the Court to Article I, Section 2 for a full and complete statement of its contents.

15. Admit.

16. Admit.

17. The first sentence is admitted. The second sentence is denied, except to admit that the certificate sent to Governor William Weld stated that Massachusetts would have ten seats in the United States House of Representatives as a result of the census tabulations.

18. The first sentence is denied, except to admit that, pursuant to 13 U.S.C. § 141(c), defendant Mosbacher and his delegatees are required to provide population data to each state after the state has submitted a plan identifying the geographic areas for which specific tabulations of population are desired. Defendants lack knowledge or information sufficent to form a belief as to the truth of the second sentence as it regards Massachusetts' law, and aver that federal law does not require that states use census tabulations for purposes of apportionment of congressional districts.

19. Admit.

20. Admit the first sentence. The second sentence is denied.

21. Admit, but aver that the Census Bureau applies a set of standardized procedures to each living situation to determine the appropriate enumeration location.

22. Admit.

23. The first sentence is denied, except to admit that the Census Bureau counted college students in the communities where they were attending school on April 1, 1990. Admit the second sentence.

24. Admit.

25. Denied.

26. Admit the first sentence. The second sentence is denied, except to admit that federal military employees are required to designate a "home of record" when they enlist.

27. Denied.

28. Denied, except to admit that, pursuant to the inclusion of the overseas military and federal employees and their dependents in the apportionment counts, the Commonwealth of Massachusetts lost a seat.

29. Paragraph 29 is a legal conclusion to which no response is required, but to the extent a response is required, denied.

30. Denied, except to admit that 1 Stat. 101 contains the quoted language, and defendants refer the Court to 1 Stat. 101 for a full and complete statement of its contents.

31. Admit, but aver that federal census enumerators counted for apportionment purposes only those persons who were usually physically residing in a state on the census date.

32. Admit.

33. Admit.

34. Admit.

35. Admit.

36. Admit the first and second sentences. The third sentence is a conclusion of law, as to which no response is required, but to the extent a response is required, denied.

37. Admit.

38. Admit, but aver that fractions of seats are not allocated among the states.

39. Admit, but aver that no method has allocated fractions of seats.

40. Admit, but aver that the statute refers to the "method of equal proportions."

41. The first sentence is denied. The second sentence is a conclusion of law, as to which no response is required, but to the extent a response if required, denied.

42. Denied.

43. Admit.

44. Admit.

45. Admit.

46. Denied.

Paragraph 47 through 56 are conclusions of law, as to which no responses are required, but to the extent that a response is required, all paragraphs are denied.

57. Admit.

58. Paragraph 58 is a conclusion of law, as to which no response is required, but to the extent that a response is required, denied.

The remainder of the Complaint sets forth plaintiffs' prayers for relief, as to which no response if required, but to the extent a response is required, denied.

Defendants deny all averments in the Complaint not hereinbefore otherwise answered, and respectfully prays that this Court:

(A) dismiss plaintiffs' Complaint with prejudice; and,

(B) grant defendant such further and other relief as this Court deems appropriate.

Respectfully submitted,

STUART M. GERSON
Assistant Attorney General

WAYNE A. BUDD
United States Attorney

JUDITH S. YOGMAN
Associate U.S. Attorney

/s/ Sandra M. Schraibman
SANDRA M. SCHRAIBMAN

/s/ Mark H. Murphy
MARK H. MURPHY

Attorneys, Department of Justice
Civil Division, Room 3708
10th & Pennsylvania Ave., N.W.
Washington, D.C. 20530
Telephone (202) 514-5124

Attorneys for Executive Branch Defendants

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was sent by regular mail this 1st day of August, 1991 to the following:

Counsel for Plaintiffs

Dwight Golann
Assistant Attorney General
One Ashburton Place, Room 2019
Boston, Mass. 02108

/s/ MARK H. MURPHY
Mark H. Murphy

EXCERPTS FROM ADMINISTRATIVE RECORD

DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

OCT 15, 1969

Alfred Meisner, Esq.
Deputy Assistant General Counsel
Department of Commerce
Washington, D.C. 20230

Dear Mr. Meisner:

This is in response to your request for our views concerning the legality of procedures the Director of the Census proposes to adopt in the enumeration of inhabitants of the United States—primarily military personnel, civilian employees of the government, and their dependents—who are abroad on the enumeration date of the Nineteenth Decennial Census. The Director proposes to secure information as to the "home State" of such persons and to allocate such persons to their respective home States. Persons living abroad would then be included in the total populations of their respective home States in the statement of State populations the President is required to send to the Congress under 2 U.S.C. 2a(a). That statement forms the basis for allocating Representatives to the Congress among the States.

As you know, the proposed home State allocation procedure represents a departure from past practice with respect to persons living abroad. The practice between 1900 and 1960 was to include such persons in the total

population of the United States, but not to include them in the total population of any State. In 1949, the Attorney General rendered an opinion with regard to the legality of that practice. He concluded that the practice was within the discretion of the Director of the Census and valid. 41 Ops. Att'y Gen. 31.

We understand that the factors which led to the Director's former practice with regard to enumeration of persons living abroad—primarily, difficulties in securing reliable information and substantial expenses of allocation—are now largely inapplicable, that it has become entirely feasible to make the proposed allocation to home States. In support of a discretionary judgment to adopt the proposed allocation procedure, it is reasonable to assume that many, if not most, persons of voting age living abroad vote in their home States and consider themselves to be represented in Congress by members from their home States. The constitutional provisions and statutes relating to the taking of the census and referred to in the Attorney General's opinion of 1949 have not been changed since that time. Finally, the decisions of the Supreme Court relating to apportionment of congressional districts within States and equality of representation in State and local governmental units have no bearing on the legality of the proposed allocation procedure. We conclude, therefore, that the Director of the Census may, in his discretion, validly adopt that procedure. We express no opinion, of course, as to the policy considerations which may be involved.

Sincerely,

/s/ WILLIAM H. REHNQUIST
William H. Rehnquist
Assistant Attorney General
Office of Legal Counsel

Statement of
Mr. Robert L. Hagan
Deputy Director
Bureau of the Census
Before the
Subcommittee on
Census and Population
House of Representatives
September 15, 1976

Madam Chairwoman, I appreciate your invitation to appear before this Subcommittee to provide you with background information concerning the Census Bureau's current plans relating to the "place of residence" concept for the enumeration of the population in the 1980 census.

In conducting the decennial population census of the United States, the Bureau of the Census has the responsibility to enumerate every person in the United States, insofar as possible. Title 2, Section 2a, of the United States Code, concerning the use of decennial census figures as the basis for the reapportionment of Representatives, states that

> "the President shall transmit to the Congress a statement showing the whole number of persons in each State . . . as ascertained under . . . each subsequent decennial census of the population, and the number of Representatives to which each State would be entitled . . .".

In determining the "whole number of persons in each State", the Bureau of the Census counts each person as an inhabitant of a place of residence that is defined as the person's usual place of residence. The Act of 1790 providing for the first decennial census stated that persons were to be enumerated at their "usual place of abode" and that persons "without a settled place of residence," shall be counted "where he or she shall be" on census day and that

"every person occasionally absent at the time of the enumeration" shall be counted "as belonging to that place in which he usually resides."

In the 1970 census, the Census Bureau, in accordance with practice dating back to 1790, counted each person enumerated as an inhabitant of his usual place of abode or residence. The concept of usual place of residence is general construed to mean the place where the person lives and sleeps most of the time. The place is not necessarily the same as the person's legal residence, voting residence, or domicile.

In order to implement the policy of counting persons as inhabitants of their usual place of residence, it has been necessary to establish specific residence rules for certain categories of persons whose usual place of residence is not immediately clear.

I have attached to my statement a table of residence rules which was used by enumerators in 1970. In general, persons were counted as members of the household where they were living on census day. Also included as members of the household on that date were persons who were staying or visiting there who had no other home, and persons who usually lived in the household but who were temporarily absent on a visit, business trip, vacation, etc.

These rules of residence are being reexamined now, as the Census Bureau makes its plans for the conduct of the 1980 census. For most of the population, the residence rules, which are given in a summary form on the census questionnaire, are easy to understand and apply. However, I wish now to review what our current plans are for some unique population groups.

Armed Forces residing in the United States.—In the 1970 census, as in every previous census, members of the Armed Forces living on military installations in the United States were counted as residents of the area in which the

installation was located. Similarly, members of the Armed Forces who were living off the military installation were counted as residents of the area in which they were living. Counting the members of the Armed Forces in this manner is in accord with the usual-place-of-residence concept since these persons were enumerated at the place in which they usually eat and sleep.

This method of enumerating Armed Forces was challenged in court in 1970. The Borough of Bethel Park, Pennsylvania, brought a suit which raised questions regarding the propriety of certain procedures established by the Bureau of the Census for taking the 1970 census. The procedures questioned related to the enumeration of members of the Armed Forces, college students, and inmates of institutions. Regarding Armed Forces, the plaintiffs questioned the procedure whereby members of the Armed Services stationed in the United States were enumerated as inhabitants of the specific location where they were living at the time of the census, rather than in the States which such individual's considered their legal residence. However, the United States Court of Appeals held that the Bureau of the Census properly enumerated members of Armed Services stationed in the United States as inhabitants of the place where they were living at the time of the census, Borough of Bethel Park v Stans (449 F 2d 575 (1971)). I have attached to my statement a copy of the Court's decision.

Since the enumeration of Armed Forces in the United States as residents of the area where they are stationed has been the practice in every decennial census, and is in accord with the usual-place-of-residence concept, the Census Bureau plans to continue to follow this same procedure in the 1980 census.

However, the Bureau is proposing a revision of one procedure that was used in the 1970 census for the enumera-

tion of certain members of the Armed Forces. In 1970, crews of U.S. Navy vessels, excluding those deployed to the overseas fleet, were counted as living on board the ship and the entire ship's crew was counted as residents of the home port of the vessel. Since some members of the ship's crew may be actually living in the home port or an adjacent area with their families when the ship is docked at the home port, rather than on board ship, more equitably distributed population counts for these areas would result if these crew members are counted as residents of the specific areas rather than aboard ship. The Bureau is now investigating the feasibility of making this change in enumeration procedures.

College students.—In the censuses of 1950, 1960, and 1970, college students were enumerated as inhabitants of the localities in which they were living while attending college. Prior to the 1950 census, most college students were enumerated as inhabitants of the States in which their parents maintained their homes. The change in procedures was made, beginning with the 1950 census, based on the recommendation of a study conducted in 1948 by the Bureau's Technical Advisory Committee on General Population Statistics which considered the impact of the sharp increase in the number of college students, both in total and in the number living at college, on the census count. It was found that under the procedure used prior to the 1950 census, the census failed to count a number of college students who were not reported at either their parental home or at their college.

Another reason for the change from counting college students at their parental home to counting them where they lived while attending college was to eliminate the inconsistency between the way college students were enumerated and the way all the other major population categories were enumerated.

Counting college students at their parental homes rather than at their usual residence while attending college would provide unrealistic results for many college towns where thousands of students spend a major part of the year. The students live in the community, draw on its resources, rely on its public services, and patronize its business establishments.

In an opinion of the Attorney General, dated March 25, 1950, (41 op. Atty. Gen: 59 (1950)) it was held that the judgment and discretion which the statutes have reposed in the Director of the Census, subject to the approval of the Secretary of Commerce, were broad enought to permit the adoption of a procedure whereby a student who was away from home attending college would be considered and enumerated as a resident of the enumeration district in which the student lived while attending college.

In the aforementioned suit brought by the Borough of Bethel Park, Pennsylvania, regarding the procedures used by the Census Bureau for taking the 1970 census, the plaintiffs challenged the Bureau's policy of enumerating college students where they lived while attending college rather than at their legal residence. However, it was the opinion of the court that the decision of the Bureau concerning the enumeration of college students was reasonable, since such students usually eat, sleep, and work in the State where the college is located.

For the 1980 census, the Bureau plans to continue to count college students as residents of the locality in which they live while attending college.

Students below college level.—Students who were away from home attending school below the college level, except those at institutional-type schools, were counted as residents of their parental household in the 1970 census. In the Court's opinion in the Borough of Bethel Park case, this method was found to be acceptable since these

students below the college level could properly be ascribed to a parental home, whereas older college students, at a transitional state of their lives, could not be. Moreover, the Court noted that:

> It is unlikely that the number of students in a school below the college level who are in attendance in a state other than that of their parental home will have an appreciable effect upon the population of either state or even the respective political subdivisions.

For the 1980 census, the Bureau plans to continue to count students attending boarding schools away from home as part of their parental household.

Persons in institutions.—In the 1970 census, persons residing in institutions where individuals usually stay for long periods of time, such as penitentiaries, mental institutions, homes for the needy or aged, or hospitals for the chronically ill, were enumerated as residents of the locality where the institution was located. People in this category, as distinguished from, for example, those in a hospital for a short period, often have no other fixed place of abode, and the length of their institutional stay is often indefinite. Patients in short-term wards of general hospitals were not counted at the hospital if they had a usual place of residence elsewhere. This procedure of enumerating persons in institutions is in accord with the concept of usual place of residence, and in connection with the suit brought by the Borough of Bethel Park, it was the opinion of the Court "that the decision of the Bureau as to the place of counting institutional inmates has a reasonable basis."

For the 1980 census, the Census Bureau plans to continue to count persons living in institutions as residents of the localities where the institutions are located.

Mobile population groups.—Persons with no usual place of residence and certain mobile population groups

present unique problems. As the general rule, such persons were counted in 1970 at the place they were staying at the time of the census to ensure their coverage in the census. Examples of our procedures for different groups are as follows. Persons staying in hotels, motels, YMCA's, and similar places were asked if they have a usual residence elsewhere. If they did not, they were enumerated where found. Persons in missions, jails, and similar places were also enumerated where found. Persons in places with shifting populations, such as construction camps and camps for migratory agricultural workers, were also enumerated where they were located at the time of the census. The Bureau plans to follow this same procedure in the 1980 census to be sure that this segment of the population is enumerated as completely as possible. Because of our concern with full coverage for these difficult groups, I should add that the Bureau plans to explore and test a wide variety of approaches to be sure, insofar as we can, that these mobile groups, such as migrant workers, are aware of the census, are aware of the need to be counted, and have the opportunity to be counted.

Americans abroad.—As in the 1970 census we plan again to make special provision for the enumeration of persons abroad including members of the Armed Forces, their dependents, civilian American citizens employed by the Federal Government, their dependents, and crews of merchant marine vessels at sea. In addition, in 1970 an effort was made to obtain reports for private citizens who were living abroad for long periods of time; however, of necessity such reporting was on a voluntary basis and thus not as complete as for the other groups. Accordingly, we plan to explore approaches which might permit us to obtain a much wider representation of this group in 1980. As noted earlier, persons who were only temporarily abroad

were to have been reported by their families or neighbors in the United States.

Because of the large number of Americans overseas at the time of the 1970 census, American military and civilian personnel working for the Federal Government and the dependents of these groups who were abroad were allocated to their home State for purposes of congressional apportionment. This was not done in any previous census.

However, we do not believe that it is necessary to allocate this population group back to their home State for apportionment purposes in 1980 for the following considerations:

1. They were not included in the apportionment population in any census other than 1970.
2. They were included in 1970 only because of the large buildup in the Armed Forces overseas during the 1960's because of the Vietnam conflict and not because of any change in the constitutional requirements or other laws governing the apportionment procedure.
3. The data on "home State" of those overseas are of an unknown reliability. In fact, a recent study conducted by the Advisory Commission on Intergovernmental Relations with recommendations for the Congress, has shown that some servicemen may select as their "home State" one with low or no income taxes rather than their "true" home State.[1]
4. Finally, it should be noted that the number overseas has been cut almost in half from 1.6 million in 1970 to about 900,000 in 1975.

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[1] *State Taxation of Military Income and Store Sales.* A Commission Report A-50, Advisory Commission on Intergovernmental Relations, Washington, D.C., Government Printing Office, July 1976.

I have prepared a more complete statement concerning this matter which, with your permission, I should like to have inserted into the record. In this more complete statement, there is a description of the influence on apportionment of the inclusion of the overseas population. In 1970, their inclusion only affected the 435th seat, and based on current estimates of the population of the States and the population overseas, their inclusion makes no change in the apportionment of the Representatives among the States.

Thank you, Madam Chairwoman, for the opportunity to present this statement. I will be pleased to answer any questions which you may have.

Attachment A

THE APPORTIONMENT POPULATION IN 1980

In defining the apportionment population for the 1980 census, it must be determined if the American military and civilian personnel of the Federal Government and their dependents who are counted abroad in the 1980 census should be allocated to their home States and included in the population of those States for the purposes of apportionment, as they were for the first time in 1970, or if they should be excluded from the apportionment population as they were in previous years.

For a number of important reasons, the Bureau is now planning to return to the traditional approach in 1980 and not include the American overseas population in the apportionment population for 1980.

In 1970, the apportionment population in each State was redefined to also include (for the first time) all American military and civilian personnel of the Federal Government from that State who were counted abroad as of April 1, 1970, and their dependents who were with them. This overseas population was allocated to "home State" for purposes of congressional apportionment.[1]

The decision to include these selected segments of the population overseas in the apportionment population was based primarily on the fact that unprecedently large

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[1] For most members of the Armed Forces, "home State" meant their "home of record" as it appeared on military records; for other members of the Armed Forces and for civilians overseas it meant the "home State" reported on the 1970 overseas census report form. The phrase "home State" was used by American overseas to designate their area of usual residence in the United States which may be their present or last voting residence, legal residence, the "home" specified in their official records, etc.

numbers of Federal Government military and civilian personnel would be overseas at the time of the 1970 census, and followed discussion with committees of the Congress. The decision was not made because of any new specific constitutional interpretation or requirement, or other law. In 1949, for example, the exclusion of the population overseas in the apportionment population had been deemed acceptable by the Attorney General (41 op. Atty. Gen. 31 (1949)).

Adding the 1.6 million Americans overseas to the counts of the States for apportionment purposes in 1970 made very minor changes in the population counts of the individual States. The addition of these selected groups abroad to the resident population for the purposes of apportionment increased the resident population by 0.8 percent. The relative increase for the individual States ranged from a high of 1.9 percent for the State of Hawaii to a low of 0.5 percent for the State of New York.

In 1970, the ratio of the apportionment population to Representatives was 469,088 persons, and the ratio of the resident population to Representatives was 465,468 persons. The attached table shows that the number of persons abroad allocated back to their home States in 1970 ranged from 145,729 persons for the State of California to 1,894 persons for the State of Alaska. The only State besides California to which more than 100,000 persons were added was Texas, which was increased by 102,057 persons.

The absolute number of persons overseas who were allocated back to their home States for the purposes of apportionment in 1970 was relatively small for any one State. The relative distribution of the population among the States was virtually the same both for the resident population and for the apportionment population, as adding Americans overseas to the counts of the States for apportionment purposes in 1970 did not change the percent distribution of the population among the States at the one decimal level, except for rounding (see attached table).[2]

However, the assignment of the population overseas back to their home States did make a difference in the number of Representatives apportioned among the states. If the 1970 apportionment had been based on the resident population only, excluding the overseas population, Connecticut would have had one more seat (for a total of 7) and Oklahoma one less seat (total of 5) than resulted from the official apportionment based on the resident population plus the overseas population.

As of September 30, 1975, the number of Americans overseas in the Armed Forces, working as civilian employees of the Federal Government, or as dependents of the Armed Forces or of civilian employees has been cut almost in half from 1.6 million to approximately 930,000.

If the apportionment calculation were based on Census Bureau estimates of the population of States for 1975 and the estimated 930,000 Americans overseas (assuming that those overseas were distributed among the States in the same proportions as in 1970), then there would be no difference in the apportionment of Representatives among the States whether the apportionment population included or excluded the overseas population.

To obtain information on the home of record of the overseas population and to tabulate the information secured for each State was a complicated process in 1970 which required a considerable expenditure of time and funds to complete. The data were collected from various

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[2] Although the figures in the attached table appear to indicate that Arkansas and California differed by 0.1 between their proportion of the apportionment population and their proportion of the resident population, this is due only to rounding. The actual difference for Arkansas was 0.002 and the difference for California was 0.005.

sources and forms needed to count the overseas population. Department of Defense tabulations of "home of record" for members of the Army, Air Force, and Marine Corps stationed overseas provided a part of the needed data. Census forms were used to obtain information from the overseas land-based Navy personnel, military dependents, and Federal employees and their dependents living abroad for an extended period. Other census forms were used to obtain information from members of the Armed Forces living in barracks in Puerto Rico and the outlying areas of the United States and from members of the Armed Forces stationed on U.S. Navy and Coast Guard ships at sea.

All of these forms had to be hand-sorted as they were received from military sources and from the U.S. diplomatic and consular posts. They were also checked off against various control cards indicating ships and locations from which returns were expected. A staff of 25 to 30 clerks worked for several months to hand-process the hundreds of thousands of questionnaires. Finally, counts of the number of persons according to "home State" were made from the assembled forms, and these counts, along with counts of the military abroad received on tape from the Department of Defense, were added to the State totals for apportionment purposes. All of this processing had to be completed prior to the transmittal of the apportionment figures to the President.

In 1970, the allocation of Americans overseas back to their home States affected the apportionment for only the last Congressional seat. At the present time, the apportionment would be the same whether those overseas were included or excluded, based on current estimates of the population in each of the States and current estimates of the overseas population. (The exact effect upon the apportionment of Representatives among the States of including

or excluding the overseas population in 1980 are unknown and cannot be determined at this time. These effects are dependent upon the interaction of the exact distribution of the resident and overseas population among the States and the operation of the particular mathematical formula, known as the method of equal proportions, used to compute the apportionment.)

We do not believe that it is necessary or desirable to allocate the overseas population back to their home State for apportionment purposes in 1980. The following considerations lead us to this conclusion:

1. Americans abroad were not included in the apportionment population in any census except 1970.

2. Americans abroad were included in the apportionment population in 1970 only because of the very large number who were overseas at that time, following the build-up in the Armed Forces overseas in the 1960's because of the Vietnam conflict, and not because of any change in the constitutional requirements or other laws governing the apportionment procedure.

3. The data on "home State" of those overseas are of an unknown reliability. In fact, a recent study conducted by the Advisory Commission on Intergovernmental Relations, with recommendations for the Congress, has shown that some sevicemen may select as their "home State" one with low or no income taxes rather than their "true" home State.[3]

4. The number of Americans abroad has been cut in half—from 1.6 million in 1970 to 930,000 as of September 30, 1975.

In view of the extra costs and complexities, technical uncertainties, and minimal (if any) impact, the Bureau

[3] *State Taxation of Military Income and Store Sales,* A Commission Report A-50, Advisory Commission on Intergovernmental Relations, Washington, D.C., Government Printing Office, July 1976.

plans to resume in 1980 the traditional approach of not including Americans overseas in the apportionment population.

ENUMERATION OF AMERICANS LIVING ABROAD

Meyer Zitter
Consultant

ENUMERATION OF AMERICANS LIVING ABROAD*

INTRODUCTION

At the present time (mid-1986) estimates suggest that there are about 1,000,000 Americans living overseas closely affiliated with the U.S. government, who, in past Censuses, were enumerated in one fashion or another. These include slightly more than one half million members of the Armed Forces, about 60,000 civilian citizens employed by the Federal Government, and about 450,000 family members of these two groups. Crews of U.S. merchant vessels outside of U.S. territorial waters also add to this group.

There is another population group, probably even larger than the above, of uncertain size, distribution, and imprecise definition with varying degrees of affiliation or association with the folks back home which also warrants attention at Census time. This is the "other citizen" overseas component, numbering, perhaps, in excess of 1 million. Efforts to count them were made in several past censuses but with very little apparent success, i.e. extremely poor coverage.

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* Prepared by Meyer Zitter, Consultant. Author's note: This report draws heavily on materials (reports, memos, letters, etc.) made available by the Census Bureau for the present purpose. These materials cover several decades of Census taking and planning. Data and references were freely extracted and used usually without precise citation or attribution. Acknowledgement and thanks are particularly due to Bob Speaker and Mark Littman of the Census Bureau's Population Division for the unlimited use of their material and time. One document (internal) in particular should be cited however and that is "1990 Research Report on Enumeration and Residence Rules," prepared by Mark S. Littman and Robert Speaker, Population Division, April 1985.

Prepared as Background document for Study of Census Residence Rules Conference, Washington, D.C., December 1986.

The report describes the Censuses past practice of handling and enumerating these groups, the concerns and responsibility of including them in the apportionment count, i.e. allocating them back to states (or even substate) for apportionment purposes, and discusses various aspects to be considered in determining the role of this group in the 1990 Census.

In the context of this report and in reference to the census taking process and census universe, the terms "overseas population" and "population abroad" are used interchangeably.

For census taking purposes and for understanding the Census in handling the overseas population, at Census time, the population abroad has been classified into the following categories:

- ARMED FORCES INCLUDING ALL BRANCHES OF SERVICE
- CIVILIAN CITIZENS EMPLOYED BY THE FEDERAL GOVERNMENT
- DEPENDENTS OF FEDERAL EMPLOYEES, CIVILIAN AND MILITARY
- CREWS OF MERCHANT VESSELS
- "OTHER U.S. CITIZENS" LIVING ABROAD

BACKGROUNDHISTORY OF ENUMERATION

Selected grops of Americans living abroad have been counted in the decennial census since 1900. However, prior to the 1950 Census, these counts were based on administrative records of the members of Armed Forces and diplomatic personnel abroad. In the 1940 Census, for example, the War and Navy Departments provided the Census Bureau with information on the number of their personnel stationed abroad, and the State Department furnished the number in the diplomatic service abroad. Illus-

strative of the levels involved, Census reports show the following administrative counts of "Military and Naval Servicemen" abroad, 1900 to 1940:

(in thousands)	
1900	91
1910	56
1920	117
1930	89
1940	119

The 1950 Census was the first census to make special provisions for the actual enumeration of members of the Armed Forces abroad, their dependents living with them, the civilian American citizens employed by the United States Government abroad, and their dependents living with them. This enumeration in 1950 was conducted through cooperative arrangements with the Departments of Defense and State. Basically, the Census Bureau provided these agencies with the *Overseas Census Report* (Form P-5), they were distributed, collected, controlled and returned to the Census Bureau. Census literature (or at least discussion with "old timers") suggests limited effort to count "other citizens", i.e. American citizens living abroad not affiliated with the U.S. government but the effort did not yield any usable figures.

Overall, slightly less than one half million persons affiliated with the U.S. government were counted overseas in 1950 by the above procedures (Appendix Table 1). Yet is is noteworthy that there was much concern during the planning phases that the number might be significantly higher in this immediate post World War II period (a figure of 1.8 million appears in Census Bureau memoranda but which also includes employees of private corporations and organizations, tourists, in addition to those actually covered). And it was in anticipation of possible large numbers

abroad that the then Director of Census sought the formal opinions from the Attorney General on the legality of the Census Bureau plans at that time, i.e. to only enumerate the "affiliated" Americans living abroad but not to include them in the total population figures for any state or in the total population of continental U.S.

In the 1960 Census, these same overseas groups were again enumerated through the cooperation of the Department of Defense and State, and, in addition, a more serious effort was made to obtain reports from private citizens who were abroad for a long period of time. The reports from "other citizens" were obtained on a voluntary basis and probably seriously undercounted the true number of Americans abroad. About 1.4 million Americans abroad were counted (Appendix Table 1).

As in 1950, these counts were not included in the total population for any state or in the total population of the 50-state area. Furthermore, there didn't appear any questions or discussions about a possible role in the apportionment process.

For the first time a separate report on AMERICANS OVERSEAS was published as part of the 1960 Census, Volume III PC(3)1C Selected Area Reports providing a broad range of social and economic characteristics of the civilian population abroad.

In the 1970 Census, American overseas were again enumerated: The Department of Defense provided the Census Bureau with tabulations by age, sex, race, marital status, education, and state of "home of record" for members of the Army, Air Force, and Marine Corps stationed overseas as of April 1, 1970. As a result these persons were not required to complete census questionnaires.

The Department of Defense distributed and collected Census-prepared questionnaires (Form D-21) for members

of land-based Navy and for Coast Guard personnel, for military dependents, and for its own civilian employees overseas and their familiies.

The Department of State handled the enumeration of other civilian government employees, their dependents, and other Americans residing abroad through the U.S. embassies and other diplomatic and consular posts. The enumeration of these "other" citizens was done necessarily on a voluntary basis—it was up to the individual to trek to the nearest consulate or embassy to obtain a questionnaire. Based upon a postcensal inquiry of the consulates, it appears there was wide dispersion in the degree to which they extended themselves to insure an accurate count. Some consulates ran elaborate ads, sent forms to persons registered at the consulate with franked return envelopes, etc., while others did virtually nothing. Many indicated a willingness to cooperate to a fuller extent if they had been given relatively small sums of money to run ads, or hire temporary staff to handle the mailing to registered Americans (the consulate in Mexico, for example, said there were 25,000 on their list and they didn't have the time or money to mail a form to each.) About 1.7 million persons were counted overseas in 1970 including 1.1 million members of the Armed Forces and 236,000 "other citizens."

Even a casual review of the "other citizen" category would suggest serious shortcomings. In fact, data from several independent sources indicates that the counts of civilians were terrible, particularly in Canada and Mexico. Globally, the Census Bureau counted some 680,000 civilians overseas in 1970 (including the assumed reliable counts—over 400,000—of those affiliated with the U.S. government); yet; "data from foreign census indicates there were at least 1.2 million U.S. civilian citizens overseas in 1970; and, theoretically, there may have been over 2 million," (from internal census memorandum).

The 1970 Census was the first, and only one, in which the main overseas population enumerated were included as part of the "apportionment" population and used in determining the distribution of seats in the House of Representatives. The groups included were: Federal employees, military and civilian, and their dependents who were counted overseas. For apportionment purposes, this group was augmented by corresponding groups living in an *outlying area* of the United States, i.e., except Puerto Rico, who reported a state of their "home of record." Persons living in such outlying areas of the United States and in Puerto Rico are not considered for present purposes as part of the "overseas" population.)

There appeared to be two main reasons for pursuing this course in 1970 as compared to earlier census. One, the larger number of persons expected to be overseas at the time of the April 1970 enumeration planning estimates cited in mid-1969 suggested these might be as many as 1.3 million members of the Armed Forces, 40,000 Federal civilian employees and close to 500,000 dependents of these two groups (these figures were not too far from the total eventually counted and used in the apportionment count—see above) and two, recent court decisions in redistricting cases and one man, one vote concerns. Because of these two factors there was growing interest in Congress and elsewhere in having persons enumerated overseas included in population figures used for apportionment purposes.

With respect to enumeration, data on Army, Air Force, and Marine Corps personnel stationed abroad were provided by the Department of Defense, rather than by enumeration forms, U.S. Navy and Coast Guard, as well

as American Merchant Marine personnel were enumerated on military and maritime personnel forms (D-21).

Federal civilian employees, dependents of all Federal employees, including families of military persons living abroad, and "other" citizens were enumerated on an *Overseas Census Report* (Form D-23). (Appendix A-1)

As in 1960, a special report *Americans Living Abroad,* PC (2)-10A was published as part of the 1970 Census Subject Reports series.

In 1980, no attempt was made to enumerate directly any of the overseas population groups. Administrative counts (but apparently no characteristics) for Armed Forces and Federal civilian employees and their dependents overseas were obtained from the Department of Defense and the Office of Personnel Management, but no data or count was obtained on the number of "other civilian citizens" who were not affiliated with the Federal government. Furthermore, none of the overseas population groups were included in the 1980 apportionment population, i.e. they were not allocated back to "home-state" as in 1970, for purposes of Congressional apportionment.

The reasons cited for not including them in the apportionment process included:

A) They were not included in the apportionment population in any census other than in 1970,

B) They were included in 1970 only because of the large build-up in the Armed Forces overseas during the 1960's (Vietnam War) and not because of any change in the constitutional requirements or other laws governing the apportionment procedure. (There is no legal requirement to include Americans overseas in the apportionment population),

C) The data collected on "home-state" of those overseas are of unknown reliability. A study conducted by the Advisory Commission on Inter-Governmental Relations had shown that some servicemen may select as their "home state" one with low or no income tax rather than their "true" home State.[1]

D) The number of Armed Forces overseas was smaller than in 1970—about half as much—as shown below.

SELECTED OVERSEAS POPULATION GROUP	1980	1970	1960
	(in thousands)		
ARMED FORCES	515	1,058	610
CIVILIAN CITIZENS EMPLOYED BY FEDERAL GOVERNMENT	48	56	38
FAMILIES OF ABOVE	433	371	506
TOTAL	996	1,485	1,154

Also, the 1970 process left a somewhat ambivalent situation of using one state total for reapportionment purposes and a different state total for all other tabulations including redistricting. This situation came about because it would have been impractical if not virtually impossible to collect the detailed addresses required to geo-code down to the precise sub-state area.

In addition, as stated, in 1980 no effort was made to collect any information on "other civilian citizens" abroad, i.e. those not connected with the Federal government. The main reasons cited include costs, lack of any mandate for collecting such data (the Director of the Census appears to

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[1] *State Taxation of Military Income and State Sales,* A Commission Report A-50, Advisory Commission on Intergovernmental Relations, Washington, D.C., GPO July, 1976.

have wide discretion, with the approval of the Secretary of Commerce with regard to the enumeration of the overseas population) the past inability to obtain such facts in a reasonably complete manner, and the lack of Congressional guidance as to which groups to include (e.g. should we include only those eligible to vote, those with intention to return, those tied financially to the U.S., such as Social Security beneficiaries or employees of U.S. corporations, etc.) Estimates of this segment of the overseas population or the number of "eligibles to be included" vary widely and the size and distribution uncertain making any planning process extremely difficult (See Appendix Table 2, for example).

Thus, in 1980, the only census data published on the overseas population was the overall counts based on administrative records (Appendix Table 1)

FUTURE PERSPECTIVES:

POPULATION ABROAD AFFILIATED WITH U.S. GOVERNMENT:

As we look ahead to 1990, a review of the past practices relative to the overseas population summarized above is most instructive. At each of the past several censuses, the treatment of overseas population received considerable attention from the Census planners, and, different decisions reached relative to their treatment at different censuses reflecting the various pressures and issues of each particular period. If the 1970 Census can be considered the high watermark in enumeration of the overseas population, at least that segment affiliated with the U.S. government, the recent 1980 experience can be considered the ebb-tide of concern, at least statistically, with our overseas population. The data obtained for the "affiliated population" was minimal—counts only obtained through ad-

ministrative records. No effort was made to reach "other citizens abroad." The factors in arriving at this decision were very compelling: money, much small numbers (size) compared to 1970, the lack of any mandate to collect such data (nobody cared) and in the case of "other citizens" extremely poor coverage, lack of guidance on whom to enumerate, and lack of knowledge on its size, composition and distribution. What it may really come down to is that anything that distracts from the main Census event represents an unnecessary risk and shouldn't be undertaken unless *there are strong, compelling reasons to do so, such as a Congressional mandate.*

For 1990, then, we need to reexamine the nature of the overseas population and its attachment to the United States. Is the overseas group to be considered a mere adjunct to the main U.S. resident population or something more permanent and an integral part of the whole?

The Census identifies at least four distinct groups each with different degrees of attachment or affiliation with the U.S. There is first the military (Armed Forces) and their families living with them. These clearly have the closest ties and strongest claim psychologically, if not socially or economically, to the U.S. population as a whole:

- they are abroad involuntarily,
- have specified periods of service and will return home,
- closely tied to the security of our nation,
- closely tied to the U.S. government,
- deeply effected by legislation and other congressional actions,
- still under U.S. jurisdiction, law/rules and regulations,
- eligible to vote (absentee) in U.S. elections,
- family ties.

In general this group would appear to be part and parcel of the U.S. population although not tied to any particular state.

The next group perhaps almost equal to or a notch below the military in the ties to the nation is civilian employees of the U.S. government (and their families living abroad with them) even though such employees serve abroad voluntarily rather than by assignment as in the military. Nevertheless, the factors mentioned above apply to them as well for the most part.

These above groups are the easiest to enumerate, and as summarized earlier have been enumerated and counted in one way or another over the years of census taking. Because of the nature of their attachment to and affiliation with the U.S. government and the nation as a whole, it appears desirable to develop a comprehensive set of data, demographic, social, and economic as part of the decennial census effort, making an important addition to the federal statistical data base. These groups are easily accessible, their whereabouts generally known, control counts available, and other federal agencies (e.g. defense, state) can be enlisted to assist and/or coordinate the flow of material, (the 1970 Census experiences would be useful in this connection.)

The users or potential uses of such expanded data for this universe have not been well documented in the past. It is possible, as has been suggested, that very little use will be made of such data. But I would venture that such will not be the case in present environment of an information society. If nothing else, the social, demographic and economic characteristics and living conditions should be of extreme importance to federal agencies for the planning, recruitment, and maintenance of its employees abroad.

"OTHER CITIZENS" ABROAD:

This group living abroad at this time of the Census represent those American citizens not affiliated with the U.S. government, and is the most difficult to comprehend and approach for enumeration purposes. 1970 was the last census any attempt was made to enumerate such persons and was largely unsuccessful in terms of complete coverage (as per above). Persons included in this category range from U.S. citizens employed by large American (or foreign) corporations, students, United Nations employees, Americans retired abroad and/or social security beneficiaries. The precise size and geographic distribution are not known; Appendix Table 2-4 show the wide range of possibilities. For example, a recent study of foreign census (Table 2) shows an overall figure of close to 1 million U.S. born persons living in other countries based on data from foreign censuses. On the other hand, reports in 1984, from the U.S. Foreign service show a figure (also in Table 2) that's almost twice as high (1.8 million) with significant differences by country. There were over 300,000 Social Security beneficiaries abroad in December 1985 (Table 3). A distribution by year since last residing in U.S. is shown in Table 4 for a different point in time. BEA, International Investments, reported 41,000 U.S. citizen employees (plus an unknown number of dependents) of major U.S. corporations with foreign affiliates (based on a 1982 survey),[2] and in tax year 1984 about 470,000 returns with 1,028,000 exemptions were filed from overseas (including military personnel).

With regard to affiliation or association with the U.S.: the group ranges from those who have definite plans or commitments to return to those only still marginally in-

[2] Conversation with Mr. Kruer, BEA, International Investments.

volved with U.S. affairs to those long time expatriates who have become part of their new (old?) country.

Considering the diverse nature, unknown size, and distribution, a decision to adequately enumerate this group should be preceded by studies on such a basic question as "whom to enumerate?" i.e. citizens only, only prior residents, only those with plans to return to the U.S. and similar questions. Tests also need to be carried out on how to reach these individuals directly i.e. to direct a census form to each individual or family, or to as many as possible. In addition to the fullest cooperation and assistance of the State Department and other U.S. agencies involved in overseas work, large corporations, educational institutions, and other organizations with substantial overseas interests, would also need to be solicited and involved.

The reasons stated for not enumerating this group in 1980 included the inability, without substantial expenditures of time and money, to achieve a complete count. Major problems associated with achieving an accurate count of Americans living abroad include the lack of up-to-date mailing lists, the voluntary nature of overseas enumeration, and the definitional problem of who should be included. These arguments are still sound but, not as compelling. The problems are not unsurmountable given time and resources. A start needs to be made if the issue of enumerating overseas Americans is to be resolved. As one census is often the pretest environment for new ideas and procedures before full integration in the census process occurs, defining the overseas group, and learning how to enumerate Americans overseas will require a similar process.

The uses of data on Americans overseas have not been well-documented; but the most important need is by the Census Bureau itself in developing postcensal population estimates and ultimately for measuring census coverage.

And measuring census coverage is one of the Bureau's highest priorities. Thus, it is extremely important to try to resolve the many problems associated with enumerating the overseas population and 1990 could be the starting point.

Paralleling the 1990 census research effort, the Bureau should consider an earlier proposal it had for a CPS supplement on Americans abroad using the multiplicity (network) sampling techniques to address the problem. With this technique, CPS respondents are asked to report on specified relatives (parents, siblings, and children) who are American citizens or who once had a usual residence in the U.S. but are now living abroad. Estimates of the number of Americans living abroad are then developed by appropriate weighting. This type of supplement could provide "counts" of Americans abroad according to citizenship and military/civilian status; (but cannot provide a full range of characteristics including state of origin useful for coverage estimates for states among others). Parallel sample supplements of this nature could provide continual reading on the amount of "emigration" from the U.S. needed to maintain the quality of its population estimates program. These supplements coupled with the periodic census enumeration of the entire overseas population will fill an important gap in census coverage and in the Federal Statistical Data Base.

OVERSEAS POPULATION—SPECIAL GROUPS:

For most groups described above, usual residence was quite clearly overseas. However, for groups aboard ships at the time of the census—naval and other maritime personnel, a specific set of rules were established to make this determination. The determination for 1980 was as follows:

NAVAL PERSONNEL ABOARD SHIPS deployed to the 6th or 7th fleet on Census Day were considered a component of the overseas population and included in the administrative count of Armed Forces abroad. This was the procedure used in 1970 and it was not questioned prior to the 1980 Census. However, because of the Iranian crisis; Norfolk, Virginia; North Charleston, South Carolina; and a few other ports had abnormally large proportions of "their fleets" deployed on Census Day and these communities complained about the prospect of not being credited with these naval personnel. The basis on which the Census Bureau included such persons "overseas" was the belief that the length of deployment generally exceeds six months. Although this is not universally so, the Department of Navy recently indicated that the average deployment over the past five years is still approximately six months.

The issue here for 1990 appears to be to "keep it simple" by continuing to assign all deployed personnel regardless of length of time of deployment to the overseas component, or should length of time of deployment play a role with those deployed shorter time periods be assigned to their home port as is the case for the non-deployed universe.

MARITIME PERSONNEL:

Other than military ships, the only shipboard personnel enumerated (1980) were those on United States flag merchant vessels (i.e. United States flag ocean going, coastal and Great Lakes merchant vessels on lists obtained from the Maritime Administration, U.S. Department of Commerce). No attempt was made to enumerate persons aboard various other types of ships (e.g. those on inland waterways, fishing vessels, oil rigs). The Bureau assumed

persons on these ships had a usual residence ashore where they would be counted. If the ship was berthed in a U.S. port on Census Day but inside U.S. territorial waters the crew was enumerated as of the port of destination if inside U.S. or home port if outside of the U.S. Crews of U.S. flag vessels which were outside of U.S. territorial waters on Census Day were considered as "overseas" and were *not* enumerated at all. (In 1970 and 1960 such groups were enumerated as part of the overseas population. See Appendix – Table 1.)

APPORTIONMENT:

As indicated earlier, 1970 was the only census in which part of the overseas population was allocated back to states for apportionment purposes. In 1980, the Bureau reverted back to the traditional status of *not* allocating any overseas population for apportionment. Looking ahead to 1990 (and beyond) there seems to be strong reasons for continuing the 1980 practice regardless of the final decision on whom and how fully to enumerate the overseas population. Two main reasons, cited earlier, for not including the overseas population in the apportionment process still appear most compelling. These are:

1) No legal mandate, no constitutional requirement to do so, and
2) No reliable way of accomplishing the feat in a sound fashion. Data collected in 1970 on "home-state" was of unknown reliability.

Furthermore, there are different methods equally valid and defensible which could have been used but which would yield a different allocation. A variety of options exist for allocating military personnel in particular, viz:

– State of pre-service residence

- State of duty station prior to leaving for overseas post. This would be consistent with method of treating stateside military personnel.
- State of voting residence
- Pro rata distribution

Finally, the inability to assign such persons to sub-state areas, a requirement for redistricting, renders the whole overseas allocation process so much less viable and questionable. Thus barring any new Congressional mandates a guidance it would appear wise to continue its 1980 practice, and that of all earlier censuses (except 1970), not to allocate the population abroad to states for apportionment purposes.

ENUMERATION OF FOREIGN DIPLOMATS:

Diplomats and other persons living on the grounds of the embassy of a foreign country were not enumerated in the 1980 census (nor in earlier censuses). However, attempts were made to enumerate all other citizens of foreign countries *resident* in the United States, whether or not they were associated with the embassy or consulate of a country. (Citizens of foreign countries *temporarily visiting or traveling* in the United States were not enumerated since they did not meet the usual residence rules). This is essentially the same procedure used in 1970 and several prior censuses.

The decision not to attempt to enumerate persons living on the grounds of embassies is based on the fact that such grounds are considered "foreign soil" and off limits to unwarranted intrusion. The Census does not send enumerators to these places (nor were enumeration forms mailed). On the other hand, foreign diplomats and support staff living in housing units independent of embassies, legations, chanceries and consulates were enumerated (or attempts were made at enumeration) as long as they met the usual residence rules. As the 1980 residency rules clearly indicated, foreign citizens who were working in the United States on a long-term basis and living in regular housing units were to be counted.

The procedures resulted in some confusion in 1980 since foreign diplomats and support staff living in such housing units did not believe they were to be counted as members of the population of the U.S. But, as it was pointed out by the State Department that while it was all right to ask diplomats and their staffs the housing and population questions, the Census had to realize if they refused to be enumerated, he/she was immune to prosecution under Title 13 due to diplomatic immunity. As a practical matter, then enumerators may attempt to count such personnel, but refusals need to be accepted more readily. Enumerators shouldn't "press" for the information as is the procedure for other refusals.

Some problems surfaced in 1980 mainly because the State Department was not sufficiently briefed on census procedures so diplomatic staff could be alerted to the process. Better communications should avert any problem in the future. Changing residence rules and enumeration procedures to exclude this group from enumeration would create unnecessary additional control problems and make the Washington D.C. enumeration job too complex. The Bureau would need some method of flagging the addresses and write special procedures so enumerators will be alerted for those housing units containing "diplomatic" personnel and use special procedures for enumeration. Introducing such additional special procedures is bound to impact on the overall job of the enumeration.[3]

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[3] See U.S. Bureau of Census, 1990 Census Committee on Special Enumeration Procedures, Final Report, July, 1984.

SUMMARY:

Americans living overseas are made up of several diverse but distinctive groups each reflecting different levels of affiliation with the U.S. government, and/or U.S. military, but with claims to citizenship and (usually) prior residence in the U.S. Socially, and psychologically, if not legally, these groups may claim a right or entitlement, if you will, to be included as part of the decennial census, or the periodic American stock-taking, as it's occasionally referred to. And in this context represents a challenge to the census-takers (Census Bureau) to develop appropriate procedures and afford reasonable opportunities for this to happen. For the most part, these individuals meet the "usual" residence definition, or more precisely the non-resident rules (discussed here in other documents) i.e., clearly all of these persons had their usual place of residence at the time of the census outside of the United States ("overseas") but by virtue of being American citizens have a legitimate claim to be recognized and counted at their usual place of residence at the time of the Census, i.e. overseas. And, after several censuses of mixed coverage and less than uniform treatment the issue needs to be addressed with a view toward a permanent solution.

PLACE OF ABODE

Theodore G. Clemence

The Census of 1790 was taken under a law enacted on March 1st of that year by the first Congress assembled under the Constitution. The generic rules of residence we still observe appear in that law, which required the numbering of inhabitants at their usual place of abode, those without a settled place of residence to be enumerated "where he or she shall be" on Census Day, and those "occasionally absent" from home at the time of enumeration "at the place in which he usually resides."[1]

We explore the origins of this three-part concept, how it was elaborated in successive censuses, and conclude with some observations on the meaning of the term "inhabitants."

My pursuit of this topic began with a question: Were these residence rules for the first census followed or ignored? To answer that suggestively, but not scientifically, I chose a small and very unrepresentative sample of public men who had some official connection with the first census, and had two or more places of residence during the nine months allowed for the actual enumeration, which extended from August 2, 1790, through the end of April 1791.

My first sample case was President George Washington. Judging from the travel entries in his diaries, he was a man without a settled place of residence, who sometimes spent a good part of a year sleeping in taverns and the homes of friends.

Indeed, during the enumeration period of 36 weeks, the President was on the road for 16 weeks, visiting every State in the Union from Rhode Island to Georgia; 15 weeks at the seat of Government, and only 10 weeks at his home in Mount Vernon, Virginia.

But, his name appears in the Virginia census, where the assistant marshal whose district included Mount Vernon probably listed the President as head of family.*

My second sample case was Thomas Jefferson, who, as Secretary of State, mailed the first census act to each Governor toward the end of March 1790. During the census period, Jefferson was almost as peripatetic as his President, but he spent more of this period in Philadelphia than anywhere else. He, like many others, was following the seat of Government around, which had no settled place of residence for itself, and was migrating from New York to the banks of the Potomac, with a long pause in Benjamin Franklin's home town.

Jefferson's name appears twice in the first census—once in Virginia at Montecello together with the appropriate tallies—and again on a schedule for Philadelphia, and in his own handwriting. There was no tally next to the name, so, presumably no double counting. According to one account, **Jefferson and Edmund Randolph, the first Attorney General, saw a census schedule posted on a tavern** wall for the inspection of all concerned, as the law required, and signed their names in case they were not listed back home.[2] It seems unlikely that either man was worried about omission, but Jefferson may have thought he should be listed "where he or she shall be" at census time. Philadelphia was his favorite city and he took a one-year lease for a Market Street house, on which he invested a considerable sum for improvements.

I added to my sample a dozen Members of Congress who were attended its sessions during part of the census period. Most of these were listed in their home States. The

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* The original Virginia returns were lost in the 1812 burning of the Capitol. The information was later reassembled from property lists and partial state census returns for years just preceding 1790.

few not found may have been missed, or numbered but not listed by name. Congressman James Madison, if counted in Virginia, would have been a tally next to the name of his father, head of family, master of plantation, and leading citizen of Orange County.

The origin of the residence, or de jure, concept of enumeration is ancient. To treat the topic exhaustively, we should have to begin with the census symbols on about 30,000 Babylonian clay tablets created 5 to 6 thousand years ago. From ancient to modern times, however, the main purposes of census taking remained constant: to assess military strength, measure wealth, and collect taxes. The quest for knowledge was a latecomer.

For raising armies and taxes, counting people where they usually lived was common sense. In some instances, people were required to gather in central places, or travel to their birthplaces to be numbered. In American census history, the mixture of de jure and de facto procedures we now follow has evolved from practical considerations, including the time allowed for canvassing, as well as social and political influences. Here, we will focus on the practical side, mainly through the laws enacted and instructions issued for the early censuses.

The delegates who gathered in Convention in 1787 knew what a census was, as well as the failure of Congress to carry one out to apportion the costs of war, as required by the Articles of Confederation. They knew what a census was because 38 censuses were attempted during the colonial period, some good and others poor. More than half of these were taken in New York, Connecticut, Rhode Island, and Massachusetts. A few of these were quite thorough and well regarded. A census of Rhode Island in 1776 so closely resembles the 1790 census in style that it may have served as a model.

At the Philadelphia Convention, the earliest version of the census clause simply called for proportioning the legislature to "the quotas of contribution or the number of free inhabitants, as one or the other rule may seem best in different cases."[3] This vague formula was soon caught up in protracted controversy over proportional representation—the one issue that deadlocked progress for several weeks. Whether the census would measure wealth, or inhabitants, or both, hung in the balance while delegates compromised their differences over representing slaves, small states vs. large, the influence of new western states, one vs. two branches for the legislature, and sectional rivalries over trade, commerce, and taxes.

A second version of the census clause is noted here only in part: representatives would be in proportion to "the whole number of white and other free citizens and inhabitants . . ."[4] This was the only time, from May's beginning to September's end, that citizens were distinguished from inhabitants in reference to the census. In all subsequent discussions of the census and proportional representation, the term "citizen" was never used.

The third version of the census clause was adopted by mid-July, after much debate about including all or none of the slaves in the basis for representation. The three-fifth's rule they adopted came from the Articles of Confederation, and was accepted as pure compromise to move beyond total impasse. Excluding Indians not taxed was not even debated.

But the July version of a census, approved on a 6 to 4 vote, had a catch. It required a census of wealth as well as inhabitants. Had the matter ended at that point, perhaps our 20 censuses would have more closely resembled the work of the tax collectors of Rome.

The notion of basing representation on wealth was favored by some southern delegates; wealth meant property, and property meant slaves, the essential ingredient in their prosperity. To other delegates, including wealth was repugnant for that very reason. Still others thought wealth and population were in close correspondence, or soon would be. Several delegates noted there was no practical way to measure wealth anyway. The issue was a slippery slope for all, and after two day's debate, the delegates climbed to safer ground and deleted the wealth requirement on a vote of 9 to 0.

In modern studies of census methods and results, statisticians sometimes find it useful to view the census as an estimate among estimates. Delegate Roger Sherman of Connecticut saw a difference:

> "The number of people alone is the best rule for measuring wealth as well as representation . . . if the Legislature were to be governed by wealth, they would be obliged to estimate it by numbers."[5]

In rejecting wealth as a rule for apportionment, the delegates abandoned an opportunity to perpetuate a landed aristocracy. In other contexts, they took similar steps to yield existing political power to future uncertainties. They were generally well-to-do—Alexander Hamilton called them the "rich and well-born"—and they were designing the rules. At times they feasted on good will, cogent arguments, and even vision. On occasion, they admitted candidly that if they failed to form a stronger union, the work would be done by a foreign sword. As much as they valued property, the best of them valued more greatly the freedom to acquire it.

Even as the delegates met in Philadelphia, owning property and acquiring freedom were linked together in the minds of the less privileged. To be secure in one's home had already found expression in bill-of-rights amendments to some State constitutions. Emigrants from Europe could

own property even if they chose not to become citizens. Colonial landholders often received 50 acres of land for each indentured white servant whose passage to America they paid for. When their servitude ended, many of these people received their freedom and a few acres of land in one breath. Although the delegates guaranteed the evil of importing slaves for 20 years, there were strong objections to this action, one protesting that it was inconsistent with the principles of the revolution and dishonorable to the American character. At the time, two States had abolished slavery and two more had prohibited importation of slaves, though the effects of these steps were more symbolic than real.

As for the census clause as finally written, once the major issues were settled, only two further points were debated briefly: when to take the first census and how often to repeat it. Politics were at work on both scores. The more rapidly growing States, which included large and small, preferred action sooner than later, and frequent alterations in representation thereafter. Thus, taking the first census 6 years after the Constitution was completed was rejected in favor of 3 years, and census intervals of 20 years were rejected in favor of 10 years.[6]

In four months, no one had spoken a word about counting people at their usual place of abode.

Less than three years later, the first census act went through Congress to the President's desk in five weeks and without significant controversy. Committee discussions are not available, but a House con....ittee drafted a bill within one week. Floor discussions reveal only a few points of contention, principally James Madison's proposal to list people by their occupations, which was approved by the House and rejected by the Senate. The House bill provided six months for the actual enumeration, though one Member observed that the more time

allowed, the less accurate the results would be. The Senate extended this period to nine months. No one on the floor spoke a word about place of abode.[7]

The census law contained about 1600 words and not a single definition. It covered, concisely, what the U.S. marshals and their assistants must do, the times allowed, boundaries to be followed, differential piece rates for urban and rural workers, public inspection of completed schedules, stiff penalties for neglect of duty, and the three residence rules cited earlier.

In 1790, there were at least a few Americans abroad, including Thomas Jefferson until his summer voyage home from France. There were people in institutions, people with two homes, riverboat captains with no settled place of residence, militia on post duty in the territories outside of any State, and college students attending, for example, Yale, Harvard, Princeton, and William and Mary. Eventually, all of these classes were attended to, as we shall see. But, in 1790, the men who wrote the first census act committed to final form as few words as they thought needed, as the delegates did who composed Article I, Section 2, of the Constitution.

A clue to this brevity of treatment is found in the intellectual continuity of authorship. Almost one-third of the 55 Convention delegates were elected to the first Congress, seven to the House, and nine to the Senate. Four of these 16 were among the dozen delegates who made the most solid contributions to the formation of the Constitution, and were active in debating proportional representation and the periodic census. Coincidentally or not, the same four men were, two each, on the House and Senate committees that wrote the census act in final form. They were: Roger Sherman, Oliver Ellsworth, James Madison and William Johnson. Their years of service in the Continental

Congress (1774-1789) were 10, 7, 5, and 3 respectively. Three were jurists. Sherman and Johnson were Connecticut State Judges. Ellsworth became Chief Justice of the U.S. Supreme Court in 1796. Madison is "father of the Constitution" in nearly every school text.

Numbering the inhabitants by place of abode, with any degree of accuracy, depended more on the marshals and assistants to whom the work was given than the authors who drew up the assignment. When the work was done, 3.9 million people were numbered next to the names of 558,000 heads of families. Many names were so common, and were used with so many variations in spelling, that the number of distinctly different names was only 27,000. My not-so-common name appears 277 times under 21 spellings.

The way in which people were listed and numbered in 1790 has almost an egalitarian cast, which would have pleased Jefferson if he studied the returns that came to the President during 1791. Virtually all of the names represented owners of property. But each got a single line, from the landed gentry to the humble farmer or shoemaker. Five columns were prescribed for numbering the people. The distinctions were few. First, they were free or slave. If free, they were white or "all other free persons"—a provision for the 60,000 free blacks included in the census. If white, they were male or female, if male, they were under 16 years of age or 16 and over.

All of these persons were ciphers with equal weights of one in the final aggregates. Only the family name was listed; by law, this was the master, mistress, steward, overseer, or other principal person therein. Thus, the wife of a plantation owner was a tally with no identity. A few lines below, an entry might appear for "H. Jones, free Negro." The aggregate returns showed that for 7 of the 16 States enumerated, the number of free blacks was higher than the

number of slaves. Of the 3.9 inhabitants numbered, slaves accounted for 694,000, or 17.8 percent. Their total was reduced by two-fifths only when additional tables were compiled for congressional apportionment. In arithmetic terms, the census act was an instruction for marshals to number all the inhabitants, whereas the census clause in the Constitution was an instruction for Congress to alter its number of Representatives.

The 1790 law was re-inacted with only slight variations for the following two censuses. The 1800 act provided for regulations and instructions, but none has survived, if any were written.

The 1810 act stipulated that the enumeration was to be made "by actual inquiry at every dwelling house . . . and not otherwise." There are two possible reasons for this caution. Some enumerators may have delegated some of their work to others, more or less under the table. In 1850, an instruction would say the work "cannot be performed by deputy or proxy." Second, enumerators may have been tempted in certain areas to copy from administrative records. Samuel Bradford of Boston completed his work in 1790 in 17 working days, numbering 1,000 people per day. At the rate of 7 persons per dwelling unit at that time, working 9 hours continuously every day, he listed and numbered a unit every 4 minutes.[8] Sounds to me like a transcription from the city's property rolls.

Preparations for the 1800 census were probably negligible, since the Department of State at the time was largely in the hands of its clerks, and they were not conscientious about administrative matters. Secretary of State John Marshall was in the job only a few months. Similar conditions prevailed in 1810. Throughout both periods, the department's foreign affairs function received most of the attention, to the relative neglect of "home office" functions. The 1810 census was taken under the official

authority of Secretary of State Robert Smith, who had no competence for it, Chief Clerk John Graham who had the competence but not the time, and senior clerk John Colvin, who had the time but not the inclination to do anything well.

This state of affairs improved dramatically for the 1820 census, taken while John Quincy Adams was Secretary of State. Adams took all of his functions seriously and attended thoroughly to details. In the spring of 1820, Adams asked around for the 1810 census instructions and discovered "there was not a line to be found upon the subject on the records of the office." After finding them in a newspaper, he prepared his own, believing that "each census ought to be an improvement upon that last preceding it."[9] His instructions were three times longer than the census act, and he mailed these to the marshals along with numerous printed forms in sufficient quantities for all enumerators. One enclosure specifically stated all of the questions to be asked, in proper sequence. The last two questions dealt with place of residence. First, was there any person without a settled place of residence; if so, give the name. Then, was there any person belonging to the family occasionally absent from it; if so, provide the age, race, sex, and condition. The instructions noted that "all of the questions refer to the day when the enumeration is to commence." Enumerators were to include "even those who may be deceased at the time when they take the account" and to exclude "infants born after" census day.[10]

Adams should be credited with starting an important tradition: methodical review of the previous census as part of careful preparation for the next one. In terms of obtaining accurate census results, his signal contribution was to have printed for the enumerators the exact wording and sequence of questions to be asked.

The 1830 and 1840 censuses were taken under similar laws and instructions as before. In advance of the 1850 census, deficiencies in procedures and errors in results received much more attention, most notably from the American Statistical Association in an 1843 report to Congress. For the 1850 census, responsibility was assigned to the Department of Interior, and the statute and subsequent instructions reflected substantial concern with accuracy. For the first time, enumerators got a package of definitions and residence rules. These decision rules are of special interest because they preceded quite a few of today's interests by 136 years.

Three operational definitions were provided. (Paraphrased)

1. *Place of Abode*—The house or usual lodging place of a person, including anyone who is temporarily absent on a journey or for other purposes, without taking up a residence elsewhere and with the intention of returning to this place.
2. *Dwelling House*—A separate inhabited tenement containing one or more families under one roof. Tenements with dividing walls of brick or wood, and separate entrances, are separate houses.
3. *Family*—A person living separately in a house or part of a house, or several persons living together in a house or part of a house, upon one common means of support. This definition included "a widow living alone and separately providing for herself," as well as "200 individuals living together and provided for by a common head," such as the residents of a jail, hotel, hospital, asylum, garrison, or other similar institution.

The first residence rule was for college students:

"Students in colleges, academies, or schools, when absent from the families to which they belong, are to

be enumerated only as members of the families in which they usually boarded and lodged on the 1st day of June." Twenty years later, this rule was stated inversely: "children and youth absent for purposes of education on the 1st of June, and having their home in a family where the school or college is situated, will be enumerated at the latter place."

The 1850 rules for crews of vessels were intended to provide uniform rules for the whole United States, but they were a struggle. Crews of vessels temporarily in port were not to be enumerated as part of the population of that place if they (a) were boarding for a few days at a sailor's lodging place, or (b) the vessel was their only habitation, or (c) they belong to other places.

The sailors and hands of a revenue cutter which belonged to a particular port, however, were to be enumerated as of such port. This rule applied to lakes, rivers, and canals, as well as seaports. Anyone left over who actually lived on a vessel was to be counted where the vessel was owned, licensed, or registered.

For crews of vessels at sea, enumerators were to visit the appropriate offices in every seaport for lists of all persons on a voyage at sea, and "register all citizens of the United States who have not been registered as belonging to some family."[11]

For the 1880 census, rules were added for transients, soldiers, and Indians. Enumerators were to search out the floating population, with the aid of property owners and police if needed, and to list transients by proxy report when all else failed. Transients were "individuals living out of families" occupying lofts in public buildings, stores, and warehouses, living solitary in cabins, huts, or tents, or sleeping on river boats and barges, all with no other usual place of abode.

The rule for soldiers took care of the Army but said nothing of naval personnel:

"All soldiers of the U.S. Army, and civilian employees, and other residents at posts or on military reservations will be enumerated in the district in which they reside, equally with other elements of the population."

Indians not taxed and not in "tribal relations" were to be included in the enumeration "as part of the ordinary population of the country for the Constitutional purpose of the apportionment of Representatives" if they were "residing in white families, engaged as servants or laborers, or living in huts or wigwams on the outskirts of towns or settlements."

We conclude our review of early place of residence rules with the 1880 instruction for resolving doubtful cases:

"The census law furnishes no definition of the phrase, "usual place of abode;" and it is difficult, under the American system of a protracted enumeration, to afford administrative directions which will wholly obviate the danger that some persons will be reported in two places and others not reported at all. Much must be left to the judgment of the enumerator, who can, if he will take the pains, satisfy himself in the great majority of instances as to the propriety of including or not including doubtful cases in his enumeration of any given family."[12]

What we have surmised all along becomes obvious in this instruction. Congress created a census act each 10 years on a broad canvass, specified only that all inhabitants were to be enumerated by a few basic residence rules, and left the details of where to count them to executive discretion. For the first century, as far as we know, the discretionary rules we have noted were not the subject of litigation.

As noted earlier, the Constitutional Convention did not debate the scope of the term "inhabitants." For census purposes, this all-inclusive term apparently held wide acceptance. The phrase "citizens and inhabitants" was on the floor briefly, and only the more inclusive term "inhabitants" was used in all subsequent discussion of the census. Only untaxed Indians would be omitted entirely. The first census act used the term "inhabitants" and the phrase "all persons" interchangeably. The phrase "usual place of residence" meant no more than the phrase "usual place of abode," but the Convention delegates drew a distinction between "resident" and "inhabitant" when they fixed the qualifications for Members of the House of Representatives. The provision appears just before the census provision in Article I, Section 2, and specifies that no person shall be a Representative who has not been a citizen for seven years, and must "when elected, be an inhabitant of that State in which he shall be chosen." At the time these restrictions were adopted, the last phrase specified "resident of that State." This was promptly amended to substitute the term "inhabitant" as less subject to misinterpretation, on the grounds that the residence qualification was controversial in several States owing to disputes over cases where a person was a resident but not present continuously. The term "inhabitant" was preferred in order to include citizens eligible for public service who were occasionally absent from home but plainly inhabitants of their home State.

The census number of inhabitants was intended to include noncitizens, foreigners as well as slaves. Evidence on this point is scant, but reasonably clear from the nature of relevant congressional debates as well as actual census practice in aggregating the returns.

The first naturalization act under the Constitutional provision for one, was enacted as a companion in time

with the first census act. On one February day in 1790, both bills were discussed on the House floor in close sequence, with a few of the same Members as participants. The main debate on naturalization was whether the rules for becoming a U.S. citizen should be generous or restrictive. At that stage in our history, generosity won out; more specifically, the economics of encouraging population increase won out.

Roger Sherman favored this development, and noted with satisfaction that the naturalization bill as drafted provided a rule for "all free white persons, which includes emigrants, and even those who are likely to become chargeable"—meaning, apparently, the prospect of some misfits from abroad who would commit crimes and end up in jail. Another Member remarked that foreigners would have to pay taxes from the time they settled among us, and taxation and representation ought to go hand in hand. Thus, foreigners should acquire citizenship readily in order to vote in elections. The final bill required two years residence in the U.S., one of those within the State of application for citizenship, oath of allegiance, and proof of good character. The opening line in the statute defined the universe affected, as, "any alien, being a free white person . . ."[13]

In taking up the census bill, no Member expressed a doubt whether these aliens should be numbered in the census. No distinction has been found in the actual conduct of the early censuses to suggest they were not counted or not supposed to be counted. For the 1820 census, a column was prescribed for counting the "foreigners not naturalized." The instructions were clear that this subtotal was part of the grand total. The census report given to Congress shows clearly that noncitizens were included in both the total population and the apportionment population.

The first apportionment bill, introduced in November 1791, took five months to get through Congress. Since there were several ways to calculate the number of Representatives to which each State would be entitled, for example, admitting or rejecting fractions, many tables were constructed and much controversy ensued. Political arithmetic and horse-trading went on for weeks as the proponents of a given scheme in one State sought support in other States, in search of a majority. The bill finally enacted in March 1792 was the occasion for the first presidential veto by George Washington, on the strength of a detail analysis of the bill by Jefferson to which Attorney General Randolph agreed. The bill allotted eight States a number in excess of the constitutional ratio. Twenty-eight House Members voted to override the veto, but 33 voted against. An acceptable bill was then enacted within a week.[14] Who was counted in the census was not an issue.

By the end of the 19th century, the historical basis for enumerating the whole number of inhabitants by practical rules of residence was well established. The residence rules became, in general terms, a continuing tradition. Moreover, the rules were elaborated through the exercise of discretion to explain the meaning of the statutes, and to obtain more uniform procedures and results, leaving doubtful situations, sensibly, to individual judgment.

We have implied that these developments also form the legal basis for who to count and where to count them. Some of the discussions to support this connection admittedly represent "sanction sub silentio." Or, in colloquial terms, silence gives consent. In truth, silence often did give consent. Many provisions of the Constitution in final form were silent, brief, or oblique as reflections of the sharp edges of Convention debate. The framers employed such

tactics in the census clause in reference to slaves as "three-fifths of all other Persons." This attempted subtlety was to encourage ratification.

Most importantly, the half-silent who and where of early census history have found voice throughout this century through legislative debate and judicial opinion. Congress has historically accepted the meaning of "total population," and "the whole number of persons" attributed here to the framers of the Constitution, and expressed by the Supreme Court in 1964 in *Wesberry v. Sanders*. The most exhaustive congressional debates on the topic occurred from 1929-1931, during discussions on the 1929 census act, which provided for automatic reapportionment; and subsequent proposals to amend the Constitution to exclude aliens from census apportionment totals. On rules of residence, including different rules in different censuses regarding military personnel or other Americans abroad, the annotated census code cites relevant case law, most of which arose during the last three decennial censuses. In general, the cases show that the courts have limited their review to the proper exercise of discretion or the propriety of their jurisdiction on constitutional grounds. Practical considerations, especially those of time and money, have invariably been given due weight.

A key ingredient in this pattern is that except on constitutional issues, the Constitution gives exclusive jurisdiction over the census to the Congress, which has delegated the details to the Census Bureau. This sturdy tradition has endured, not through silence or subtlety, but through controversy and litigation.

Thus far, the census takers have adhered to sound practice well grounded in our early history, and changed the rules for good reasons. If this past is prologue, they will do all right the next time.

November 1986

NOTES

[1] Census Act of March 1, 1790, 1st Congress, 2nd Session, Statutes, 101.

[2] *Census '80: Continuing the Factfinder Tradition,* Bureau of the Census, GPO, Washington, D.C., 1980, p. 11.

[3] *Formation of the Union of the American States,* 69th Congress, 1st Session, House Document No. 398, GPO, Washington, D.C., p. 116.

[4] Ibid, p. 202.

[5] Ibid, p. 356.

[6] Ibid, p. 367.

[7] *Annals of Congress,* 1st Congress, 2nd Session, Vols. 1 & 2, pp. 980-1170, passim.

[8] *A Century of Population Growth,* Bureau of the Census, GPO, Washington, D.C., 1909, p. 46.

[9] *The Jeffersonians: A Study in Administrative History, 1801-1829,* Leonard D. White, The MacMillan Co., New York, 1951, p. 204.

[10] These and subsequent references to ennumerator instructions are taken from Carrol D. Wright, *The History and Growth of the United States Census,* U.S. Senate Document No. 194, 56th Congress, 2nd Session, 1900, pp. 133-171.

[11] Ibid, pp. 150-151.

[12] Ibid, pp. 168-171.

[13] *Annals of Congress,* 1st Congress, 2nd Session, Vols. 1 & 2, pp. 1165-1463, passim.

[14] See *George Washington,* Vol. 6, Douglas S. Freeman, Charles Scribner's Sons, New York, 1954, pp. 343-348; and *Congressional Apportionment,* Lawrence F. Schmeckebier, Brookings Institution, Washington, D.C., 1941, pp. 226-233.

UNITED STATES DEPARTMENT OF COMMERCE
WASHINGTON, D.C. 20230

BUREAU OF THE CENSUS

ENUMERATION AND RESIDENCE RULES FOR THE 1990 CENSUS: WHO TO COUNT AND WHERE TO COUNT THEM

DR. JOHN G. KEANE
DIRECTOR, BUREAU OF THE CENSUS

UNITED STATES HOUSE OF REPRESENTATIVES
SUBCOMMITTEE ON CENSUS AND POPULATION

APRIL 18, 1988
ROCKVILLE, MD.

INTRODUCTION

Mr. Chairman, I am here today to report to you on the enumeration and residence rules we plan to use to conduct the 1990 census. By *enumeration* rules, I mean who we will count. By *residence* rules, I mean where we will count them.

The Census Act of 1790 covering the first decennial census established the concept of "usual residence" as the guiding principle. This concept still governs the establishment of enumeration and residence rules. If the usual residence is in the United States, we count the person. If it is outside the United States, we do not. To determine where to count a person, we define "usual residence" as where a person lives and sleeps most of the time time. Usual residence is not necessarily the same as legal residence, voting residence, or the place where a person is found on Census Day.

As in past censuses, we identified specific population groups and living situations for which we must establish enumeration and residence rules. To determine the rules, we examined past practices and sought advice from outside experts. In December 1986, the Council of Professional Associations on Federal Statistjcs (COPAFS) arranged a conference to discuss decennial census enumeration and residence rules. Forty-five experts on various population groups for which residence may not be clearcut attended this meeting. It was an important milestone in the development of our plans.

We also hired a private consulting firm to participate in the conference and to develop recommendations based in part on the discussions at the conference. This additionally strengthened our planning.

First, I will discuss enumeration rules, and then I will discuss residence rules.

ENUMERATION RULES

The enumeration rules for the 1990 census are consistent with the practices of past censuses. We will attempt to count all persons residence in the United States on Census Day, April 1, 1990. This includes American citizens, aliens (documented and undocumented), and foreign diplomatic personnel who do not live on the premises of an embassy or legation. Americans who are temporarily abroad will be counted at their usual residences. (Foreign diplomats residing on the premises of an embassy or legation will not be counted because their residences are considered to be on foreign soil. Foreign travelers in the United States for a short time, such as tourists or business persons, will not be counted because they have not established residence.)

Based on the concept of usual residence, we plan to count undocumented aliens in the 1990 census. Some people argue that undocumented aliens should be excluded from the apportionment counts. Legal and constitutional issues aside, there is no acceptable method to do this. We believe the methods that have been proposed so far—including direct enumeration and estimation—would be likely to introduce significant errors that could affect the allocation of one or more congressional seats.

One method that has been proposed is to ask respondents whether they are legal residents of the United States. Then we would count only legal residents for apportionment purposes and all residents for other purposes. This method has serious flaws and could seriously jeopardize the accuracy of the census:

- A census of only legal residents cannot be done as accurately as a census of all residents. People who are undocumented aliens may either avoid the census altogether or deliberately misreport themselves as legal residents in the census.

- The 1990 census counts for some states and substate areas may be lower than expected. Legal residents may be confused about why the Government is asking whether a person is here legally. Legal residents, therefore, may misunderstand or mistrust the census and fail to respond.
- The census would be less accurate because we could not check on whether all legal residents had been included. We would not know whether a specific housing unit contained legal residents who had failed to answer the census or undocumented residents who avoided the census.
- Undocumented aliens are unlikely to report to the Census Bureau, a Government authority, that they are in the country illegally. If they are not correctly identified, we would have no way to exclude undocumented aliens from the census counts for apportionment but include them for other purposes.
- If large proportions of undocumented aliens avoid the census, the 1990 census counts will be lower than states and substate areas expect. We will not know at the time of apportionment whether this results from undercount of legal residents or from undocumented aliens who avoided the census. Those who avoid the census would not be included in any counts, even for purposes other than apportionment.
- Finally, many aliens do not *know* precisely what their legal status is because the determination of legal status can be very complicated. In many cases it involves administrative and judicial proceedings and that is not something we can provide in the census.

Another proposed method is to subtract an estimate of undocumented aliens from the census count. We would

have to get the number of legal aliens in the country from the Immigration and Naturalization Service (INS). Then we would compare that number with the number of aliens, both legal and undocumented, reported in the census. The difference would be subtracted from the census counts to get an estimate of the number of legal residents.

This method is also seriously flawed. The INS does not have counts of the number of legal aliens in the country now or on Census Day. They also do not know where most legal aliens reside. Such information would be vital to implement this method. Even if the INS could obtain this information in time for the census, the apportionment counts would be estimates. If Congress mandated that we exclude undocumented aliens from the apportionment counts, it would be the first time in history that Congress will have directed that the census be designed to use statistical estimates to apportion the House of Representatives. If the INS estimates of legal aliens are not complete and accurate, our estimates of undocumented aliens could be too high or too low. Thus, we could subtract too many or not enough people from the census. The numbers for apportionment might still include an unknown number of undocumented aliens, or they might not include all legal residents. Finally, apportionment could be challenged on the basis of different procedures for estimating the number of legal residents.

According to the usual residence concept, the 1990 census counts for apportionment would not include military personnel or their dependents living outside the United States. For the 1990 census, we could obtain counts of military personnel stationed overseas by using Department of Defense (DOD) administrative records. The DOD may have home state of record and state of last U.S. residence. We have some concern that the state information reported

by overseas military personnel as home of record in the United States, if any, may not be a "residence," but may be chosen for other reasons. The last U.S. residence may not be a state to which they expect to return. In spite of these quality concerns, we could allocate this population to states for apportionment purposes, using administrative records, should we be directed to do so.

It might appear that a census of overseas military personnel would solve these problems with the quality of home state information, but that may not be the case. The home state information collected in a census may be no better than that in the administrative records. Some military personnel do not maintain a usual residence in the United States while they are stationed overseas. Other military personnel may report the home of record accurately in both the DOD administrative records and in a census. Those who report a home of record in the administrative records that is not in fact a "residence" are likely to report the same home state in a census, particularly if the census is administered by military personnel.

An overseas military census would be a large, complicated, and expensive new operation. The home state information needed for apportionment may not be much different from that we could obtain, more efficiently, through the use of DOD administrative records.

For military dependents, the DOD administrative records do not contain accurate residence information. In many cases, it may not be possible to determine whether the dependents were living in the United States and therefore, already included in the census, or are with the military person living overseas.

RESIDENCE RULES

Persons Away from Their Usual Residence

Now, I will turn to residence rules. We plan to count persons away from their usual residences on Census Day at their usual residences. This would include business travelers and vacationers, for example. One way we do this is to leave questionnaires at each room in hotels, motels, and camp-grounds. Persons who will not be enumerated by a household member at their usual residence can fill out a questionnaire and include the address of their usual residence. We will count them at that address.

Persons with Multiple Residences or no Residence

We will count persons with multiple residences, including members of Congress, at what they consider to be their usual residence; we can only count persons at one residence. We will count persons with no usual residence, such as the homeless, where they are found living or staying at the time of the census.

College and Boarding School Students

We plan to count college students living away from their parental home at their college or university residence. Prior to 1950, we counted such persons at their parental home. We found that many parents failed to include their children away at college, leading to an undercount of this population. Therefore, for the 1950 census we switched to the practice we currently use. In addition, since college students eat, sleep, and work most of the year in the area of the college, it is in keeping with the "usual residence" concept to count them at their college residence. Boarding school students below the college level will be counted at

their parental home. Because of their age and dependency on their parents, their parents are likely to consider them part of the parental home.

Movers and Migrant Workers

We will count persons who move on or near Census Day at the place they consider to be their usual residence on Census Day. We will count migrant workers either at the camp where we contact them or at their usual residence, if they report one.

Care or Custody Facilities

We will count persons residing in a long-term care or custody facility—such as a mental institution or prison—as residents of the institution. Persons in a short-term care or custody facility—such as a general hospital—will be counted at their usual residence, if they have one, or at the facility if they do not.

U.S.-Based Armed Forces and Marltime Crews

We will count land-based members of the Armed Forces residing in the United States at their usual residence, whether it is on base or off base. We will count crews of U.S. Navy ships and crews of U.S. Coast Guard vessels at their usual residence, whether it is on board ship or on shore. The exception to this is crews of vessels deployed to the 6th or 7th Fleets, which we will consider part of the overseas population. We will count crews of maritime vessels flying the American flag at their usual residence, whether on board ship or on shore.

FINAL THOUGHT

At the hearing last week on the 1990 census questionnaires, I emphasized that we are on a tight time schedule with regard to getting the questionnaire printed and must finalize our plans soon. Without questionnaires we cannot conduct the census. We must begin preparing our final package for OMB clearance on May 2. What is true for census content and sample design, is true also for enumeration and residence rules. We cannot finalize the questionnaires until enumeration and residence rules are final.

Mr. Chairman, that concludes my testimony. We established these enumeration and residence rules based on consistency with historic practices and on our belief that they will contribute to our goal of having the most accurate census possible. I will be happy to answer any questions you may have.

[SEAL]

GENERAL COUNSEL OF THE
UNITED STATES DEPARTMENT OF COMMERCE
Washington, D.C. 20230

[08 JUN 1988]

Honorable William D. Ford
Chairman, Committee on Post Office
and Civil Service
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This is in response to your request for the views of this Department on H.R. 4720, a bill to amend title 13, United States Code, to require the Secretary of Commerce to include all Federal civilian and military personnel stationed overseas, and their dependents living overseas, in the census counts for apportionment.

The bill would require that "any member of any of the uniformed services . . ." and "any civilian employee of the United States who is absent from the United States as a result of having been assigned to a post of duty outside the United States, and any dependent of any such member who has left the United States in order to reside at or near such post" be included in the apportionment counts. It specifies that the place of residence for these persons "shall be considered to be the individual's last place of general abode within the United States for a period of 6 consecutive months or longer."

The Department opposes the enactment of H.R. 4720. The Administration believes that the concept of "usual residence," where a person lives and sleeps most of the time, is the appropriate basis for deciding who should be counted in the census. Because no administrative records

exist that include the necessary residence information or information about dependents, H.R. 4720 would require a complete census of all overseas Federal employees.

The Office of Personnel Management reports that 11 cabinet departments and 17 other Federal agencies had citizen employees in foreign countries as of January 1988. These employees were stationed in about 160 countries. Adding such a large and costly operation to the census this late in the decade gives the Census Bureau little time to plan, coordinate, and budget for this effort.

The Census Bureau and the Department of Defense (DOD) have agreed to conduct a census of overseas DOD employees and their dependents. The data collected under this agreement are for statistical purposes, not apportionment. The DOD has agreed to pay all the costs of censusing its overseas employees and their dependents. The DOD will distribute and collect census forms, using procedures specified by the Bureau of the Census. There is no comparable agreement with any of the 27 other agencies that have employees stationed overseas.

The Department of Justice advises that it has doubts about the constitutionality of any legislation that would seek to include for apportionment purposes military personnel, Federal civilian employees, or their dependents, when such individuals live outside the United States.

We have been advised by the Office of Management and Budget that there is no objection to the submission of this report from the standpoint of the-Administration's program.

Sincerely,

/s/ ROBERT H. BRUMLEY
Robert H. Brumley
General Counsel

[SEAL]

GENERAL COUNSEL OF THE
UNITED STATES DEPARTMENT OF COMMERCE
Washington, D.C. 20230

[JUN 23, 1988]

Honorable William D. Ford
Chairman, Committee on Post Office
and Civil Service
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This letter responds to your request for the views of the Department of Commerce on H.R. 3814 and H.R. 4234. The bills would add new provisions to 13 U.S.C. 141 to require the Secretary of Commerce to ensure that tabulations of population used for apportionment of Representatives in Congress: (1) include members of the armed forces and their dependents living overseas; and (2) exclude aliens not lawfully admitted for permanent residence. In addition H.R. 3814 would require the Secretary to include civilian employees of the Department of Defense and their dependents living overseas.

The Census Bureau bases its decision about who should be counted in the census on the concept of usual residence. Usual residence, a principle that was established by the Census Act of 1790, is defined as where a person lives and sleeps most of the time. Usual residence is not necessarily the same as legal residence, voting residence, or the place where a person is found on Census Day. If the usual residence at the time of the census is in the United States, we count the person. If it is outside the United States, we do not. According to the usual residence concept, the 1990 census counts for apportionment will not include military

personnel or their dependents, living outside the United States, and will include all persons usually resident in the United States on Census Day without regard to their legal status.

The most recent legal review of our practice of including all aliens in the census counts without regard to their legal status occurred in connection with the 1980 census. Although the case was decided on procedural grounds, the U.S. District Court observed in *Federation for American Immigration Reform* v. *Klutznick*: "It [the Constitution] requires the counting of the 'whole number of persons' for apportionment purposes, and while illegal aliens were not a component of the population at the time the Constitution was adopted, they are clearly 'persons'." D.C.D.C. (1980) 486 F. Supp. 564.

The Department of Justice advises that it would be unconstitutional to exclude aliens who claim the United States as their residence and that it has doubts about the constitutionality of any legislation that would seek to include for apportionment purposes military personnel, the Department of Defense (DOD) civilian employees or their dependents, when such individuals live outside the United States.

The Census Bureau and the DOD have agreed to conduct a census of overseas DOD employees and their dependents. The DOD has agreed to pay all the costs of censusing its overseas employees and their dependents. The DOD will distribute and collect census forms, using procedures specified by the Census Bureau. The data collected under this agreement are for statistical purposes, not apportionment.

We have not found an accurate procedure to exclude illegal aliens from the apportionment counts. We believe the proposals we have examined so far—including direct enumeration and estimation—would be likely to intro-

duce significant errors that could affect the allocation of one or more Congressional seats. We cannot forecast with certainly how many seats and which states might be affected.

One method that has been proposed is to ask repondents whether they are legal residents of the United States and count only the legal residents for apportionment purposes and all residents for other purposes. This method has flaws:

- A census of only legal residents cannot be done as accurately as a census of all residents. People who are illegal aliens may either avoid the census altogether or deliberately misreport themselves as legal residents in the census.
- The 1990 census counts for some cities and states may be lower than expected. Legal residents may be confused about why the Government is asking whether a person is here legally. Legal residents, therefore, may misunderstand or mistrust the census and fail to respond.
- The census would be less accurate because the Census Bureau could not check on whether all legal residents had been included. The Census Bureau would not know whether a specific housing unit contained legal residents who had failed to answer the census or illegal residents who avoided the census.
- Illegal aliens are unlikely to report to the Census Bureau, a Government authority, that they are in the country illegally. If they are not correctly identified, the Census Bureau would have no way to exclude illegal aliens from the census counts for apportionment but include them for other purposes.
- If large proportions of illegal aliens avoid the census, the 1990 census counts will be lower than cities

and states expect. The Census Bureau will not know at the time of apportionment whether this results from undercount of legal residents or from illegal aliens who avoided the census. Those who avoid the census would not be included in any counts, even for purposes other than apportionment.

Another proposed method is to subtract illegal aliens from the census count. The Census Bureau would have to get the number of legal aliens in the country from the Immigration and Naturalization Service (INS) and compare that number with the number of aliens, both legal and illegal, reported in the census. The difference would be subtracted from the census counts to get an estimate of the number of legal residents. This method s also flawed:

- The INS does not have counts of the number of legal aliens in the country now or on Census Day. They also do not know *where* most legal aliens reside. This information would be vital to implement this method.
- Even if INS could obtain this information in time for the census, the apportionment "counts" would be estimates. If the Congress mandated that we exclude illegal aliens from the apportionment counts, it would be the first time in the history of the census that Congress will have directed that the census be designed to use statistical estimates to apportion the House of Representatives.
- If the INS estimates of legal aliens are not complete and accurate, the Census Bureau's estimates of illegal aliens could be too high or too low. Thus, the Census Bureau could subtract too many or not enough people from the census. The numbers for apportionment might still include an unknown

number of illegal aliens, or they might not include all legal residents.

- Apportionment could be challenged on the basis of different procedures for estimating the number of legal residents.

One of the ways the Census Bureau decides what to ask in the census is whether the subject is suitable for self-enumeration. This is important because only about 78 percent of the households in the country are likely to answer their questionnaires and return the forms by mail. The determination of legal status among types of aliens is not straightforward. Many aliens do not know precisely what their legal status is; it requires administrative and judicial review. Neither the Census Bureau nor its enumerators in the field have the legal qualifications to assist respondents in answering such a question.

H.R. 3814 and H.R. 4234 specify that only aliens who have been lawfully admitted as permanent residents should be included in apportionment counts. This category of aliens may not be easily identifiable in either of the proposed methods. Other aliens, such as refugees and students, may be confused about their legal status and misreport themselves. Although INS records can give us numbers of persons admitted to the country as permanent residents, they do not show how many of those persons have subsequently left the country nor do they include current addresses for those who have stayed. This information is crucial to using INS records to estimate the number of aliens to be excluded.

A special group that would be excluded from apportionment counts if these bills were enacted are those aliens who receive amnesty under the Immigration Reform and Control Act of 1986. These persons will be granted temporary resident alien status initially. After 18 months, each person is eligible to apply for lawfully permanent residence.

The period during which these people will be applying for permanent resident status is likely to be from late 1989 until early 1991. Even those who will have applied before Census Day are not likely to have completed the application process. They therefore would not be included in the apportionment counts under the provisions of H.R. 3814 or H.R. 4234.

Another groups that would be excluded from the apportionment counts if these bills were enacted are aliens here under the "extended voluntary departure" or "temporary safe haven" categories. Many Polish nationals are in the United States with this indefinite status, neither legal nor illegal. Congress is considering extending this status to certain Central American aliens in this country.

For these reasons, the Administration opposes enactment of H.R. 3814 or H.R. 4234. We have been advised by the Office of Management and Budget that the submission of this report is consistent with the Administration's program.

Sincerely,

/s/ ROBERT H. BRUMLEY

Robert H. Brumley
General Counsel

[SEAL]

GENERAL COUNSEL OF THE
UNITED STATES DEPARTMENT OF COMMERCE
Washington, D.C. 20230

JUN 23 1988

Honorable William D. Ford
Chairman, Committee on Post Office
and Civil Service
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This letter responds to your request for the views of the Department of Commerce on H.R. 3815, "Relating to decennial census of population." This bill would add a new provision to 13 U.S.C. 141 to require the Secretary of Commerce to ensure that tabulations of population used for apportionment of Representatives in Congress include members of the armed forces, civilian employees of the Department of Defense (DOD), and dependents of such members or employees, living overseas.

The Census Bureau bases its decision about who should be counted in the census on the concept of usual residence. Usual residence, a principle that was established by the Census Act of 1790, is defined as where a person lives and sleeps most of the time. Usual residence is not necessarily the same as legal residence, voting residence, or the place where a person is found on Census Day. If the usual residence at the time of the census is in the United States, the Census Bureau counts the person. If it is outside the United States, the Census Bureau does not. According to the usual residence concept, the 1990 census counts for apportionment will not include military personnel, DOD

civilian employees, or their dependents living outside the United States.

The Census Burea and the DOD have agreed to conduct a census of overseas DOD employees and their dependents. The data collected under this agreement are for statistical purposes, not apportionment. The DOD has agreed to pay all the costs of censusing its overseas employees and their dependents. The DOD will distribute and collect census forms, using procedures specified by the Bureau of the Census.

The Department of Justice advises that it has doubts about the constitutionality of any legislation that would seek to include for apportionment purposes military personnel, DOD civilian employees, or their dependents, when such individuals live outside the United States.

For these reasons, the Administration opposes the enactment of H.R. 3815. We have been advised by the Office of Management and Budget that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

/s/ ROBERT H. BRUMLEY

Robert H. Brumley
General Counsel

FORM CD-183
(REV. 3-88)

U.S. DEPARTMENT OF COMMERCE

ABSTRACT OF SECRETARIAL CORRESPONDENCE

TO: ☒ The Secretary ☐ The Deputy Secretary Control No.:

Date:

DECISION MEMORANDUM

From: Michael R. Darby
Under Secretary for Economic Affairs

Prepared by: C.L. Kincannon/Census/US EA/763-5192

SUBJECT

1990 Census: Counting Military and Dependents Overseas for Apportionment Purposes

STATEMENT OF THE ISSUE

Up until now, the Census Bureau had not planned to include the military overseas in the 1990 census apportionment counts. To satisfy what appears to be a growing bipartisan concern of the Congress and to avoid unnecessary debate, the Census Bureau proposes to change its plans. The Department of Defense (DOD) believes strongly that its employees should not be excluded from apportionment counts because of temporary and involuntary residence overseas. Many, if not most, of these military overseas consider themselves to be usual residents of the United States, even though they are temporarily assigned overseas.

BACKGROUND

It is possible to include counts of military and civilian employees of the DOD. At its own expense, the DOD plans to conduct a census concurrently with the stateside census in April 1990. We are working closely with DOD on the form and procedures to be used. A significant reason for changing our plans is that the DOD has just recently stated that it is now feasible to provide the necessary counts of usual residents to us in time to meet the December 31, 1990 deadline for reporting apportionment counts to the President. If other Federal agencies had a means of providing to us timely and acceptable counts of overseas employees, we would include them as well.

The Commerce Department has the discretion, under Title 13, United States Code, to make this decision. The 1970 census was the only other census to include military overseas in the apportionment counts. At the time of that decision, the Department sought the opinion of the Justice Department on the legality of including military overseas.

Then Assistant Attorney General, William H. Rehnquist, in his legal opinion stated that the Constitutional provisions and statutes relating to the taking of the census and referred to in the Attorney General's opinion of 1949 have not been changed since that time. In the 1949 opinion the Attorney General wrote,

> "In summary, the Congress has vested in the Director of the Census, subject to the approval of the Secretary of Commerce, discretion to determine the manner in which inhabitants of the United States who are abroad on the enumeration date shall be enumerated. . . ."

RECOMMENDATION

I recommend that you approve the decision to include military and dependents overseas in the 1990 census for apportionment, provided that there is timely receipt of acceptable data from the Defense Department.

DECISION

Approve _____ X _____ Disapprove _____

discussed w/RM
7/31/89

	PREPARED BY	CLEARED BY	CLEARED BY
SURNAME & ORGANIZATION (Please type)	C.L. Kincannon L/Dir. Census	_ CH.C./EA	HAScarr
INITIALS AND DATE	*C.L.K* 7-22-89	*CH.C.* 7/27/89	*HAS* 7-28-89

PREPARED BY	CLEARED BY	CLEARED BY	CLEARED BY
SURNAME & ORGANIZATION (Please type)	Susanne Howard	Wendell Willkie	Counsellor
INITIALS AND DATE	*S.H.* 7/28/89	*W.W.* 7/31/89	*WB* 7/31/89

STATEMENT

OF THE

DEPUTY ASSISTANT SECRETARY OF DEFENSE

FOR

RESOURCE MANAGEMENT & SUPPORT

DAVID J. BERTEAU

HEARINGS BEFORE THE

SUBCOMMITTEE ON CENSUS AND POPULATION

OF THE HOUSE POST OFFICE AND

CIVIL SERVICE COMMITTEE

AUGUST 1, 1989

FOR OFFICIAL USE ONLY
UNTIL RELEASED BY THE
SUBCOMMITEE

I would like to thank the Subcommittee for inviting the Department of Defense to provide its comments on the censusing for apportionment purposes of DoD's military and civilian employees and their dependents abroad not only in the 1990 U.S. Census of Population but in all decennial censuses to come.

The Department has previously testified, and strongly reasserts, that its employees and their dependents overseas should be included in all decennial censuses which constitute the official statistics of the United States and which provide the population numbers used for apportionment purposes. Duty locations overseas are under the legal purview of the United States. The employees and their families pay taxes and receive their pay from the U.S. Government. It is in the service of their country that they are sent overseas. They have thus not chosen to live overseas in the usual sense of the term "choice." They consider themselves part of the U.S. population and are treated as such.

In the past, when the Congress has directed the Census Bureau to count the overseas military for apportionment purposes, the Bureau has requested information from DoD administrative files. In complying with those requests, we have been forced to use information on what is termed "home of record." We now know that this particular data element in our personnel records has a high error rate. "Home of record" may also be a place where the person has not lived for many years and, in some cases, may be a place where the employee has never lived.

After investigating all data elements on personnel records which indicate some form of state affiliation, the DoD decided that none of them meets a reasonable test of validity for apportionment purposes. That is one major reason why the Department supports the undertaking of an enumeration of the DoD overseas population in 1990,

concurrent with the decennial census in the 50 states, DoD, with the assistance of the Census Bureau, will gather data on employees' last U.S. state of residence for at least six consecutive months. Information on this last residence closely approximates the Census' concept of "usual residence" and can be used, the Department feels, for apportionment purposes. Should the Department once again be asked to provide data for apportionment purposes, at least in 1990 we will have information which closely approximates the Census' concept of "usual residence," the basis on which other U.S. citizens are apportioned.

Of course, our overseas enumeration will also provide us with a great deal of additional information which can be merged with decennial data gathered in the 50 states as well. It will provide us with data on the actual number of spouses and dependents overseas and on overseas employees' household structures and family characteristics and on the citizenship status of household members. Information from it will be merged with information from the decennial census to permit additional and more accurate comparisons between military and civilian compensation, which we greatly need for our Congressionally mandated quadrennial reviews of military compensation. The expanded military sample will also permit DoD to make more accurate and detailed comparisons between military and civilian families on a variety of important demographic, socioeconomic, and housing characteristics, including, for example, spouse employment and the number of youth and old-age dependents. Information like this will allow us to reassess and more accurately specify program plans concerning a variety of family-oriented programs in each of the Active Services, especially those programs related to family well-offness, day care needs, and spouse employment advisory services. In addition, we will have more information on dual military

couples to compare to data on two-earner civilian couples, which is especially important for DoD research and program planning in the areas of readiness and retention of highly trained personnel. Finally, but perhaps most importantly, the overseas census will provide information crucial to a centralized and complete database the DoD can use for complete evacuation planning in the event of a crisis.

Our overseas enumeration project entails an agreement with the Census Bureau to provide advice and technical expertise on data collection and form construction, and management of form printing. The Census Bureau will also perform data weighting and processing, including merging the overseas data with decennial data, and provide data products, such as hard-copy reports and data tapes. Under DoD's directions, a contractor will handle the overseas enumeration operations of distributing and tracking the forms, receiving them back and sending them to the Census Bureau for processing. The information will be collected on April 1, 1990. The entire project will be completed in 1994.

We have made plans to have available in 1990 data on DoD overseas employees and their dependents which can be used for apportionment purposes so that data from administrative files would not have to be used for such purposes. The Department has not made long-term plans to conduct such an overseas enumeration every ten years, however. This decision would depend upon our experiences with this first overseas enumeration effort and other factors not under Departmental control.

I close by repeating and reemphasizing that the Department feels that its overseas employees and their dependents should not be excluded from the official statistics of the United States or from the apportionment counts by virtue of their overseas residence at census time.

Again, thank you very much for this opportunity to express the view of the Department of Defense of these matters.

HOUSE OF REPRESENTATIVES
COMMITTEE ON POST OFFICE
AND CIVIL SERVICE
Washington, DC 20515-6243

Telephone (202) 228-4054

April 5, 1990

Dr. Barbara Bryant
Director
U.S. Department of Commerce
Bureau of the Census
Washington, DC 20233

Dear Dr. Bryant:

On August 1, 1989, the Bureau of the Census announced its intention to include service personnel stationed overseas in the 1990 Decennial Census. We were very pleased that our dedicated service personnel would be included for purposes of reapportionment.

Unfortunately, funding shortfalls in both the Department of Commerce and the Department of Defense have made an actual enumeration based on individual questionnaires unfeasible. At this time, an enumeration based on service records is anticipated. The next issue which must be resolved is the geographic placement of service personnel for reapportionment purposes.

In 1988, the House of Representatives voted on a measure which would enumerate service personnel at the location where they had last resided continuously for six months. In a vote of 93-317, the measure was defeated.

During debate on the floor, Members of Congres suggested a more reasonable method of enumeration. Upon entering the service, each member of the armed services must indicate a "home of record." This home of record will remain constant throughout the enlistment period and reflects the state where the individual resideded prior to enlistment. Upon discharge from service, the individual is granting a moving stipend to cover the expense of moving from the point of discharge back to the home of record.

While the Census Bureau has depended on the long-standing usual residence rule, this rule is unworkable when dealing with service personnel stationed overseas. The only administrative listing which would best describe the residence of our members of the armed forces stationed abroad is the home of record. After all, the state listed for the home of record is the last location at which the members of the armed forces *CHOSE* TO RESIDE. In a very real sense, those states had this population taken from them by federal action.

As members of the House Committee on Post Office and Civil Service, we urge you to enumerate overseas service personnel at their home of record. We look forward to working with you on this and other isues affecting the 1990-Decennial Census.

Sincerely,

/s/ William O. ?????? ????? Gilman

/s/ Tom Sawyer Tom Ridge

UNITED STATES DEPARTMENT OF COMMERCE
BUREAU OF THE CENSUS
Washington, DC 20233

OFFICE OF THE DIRECTOR

May 17, 1990

MEMORANDUM FOR Michael R. Darby
Undersecretary for Economic Affairs

Barbara Everitt Bryant
Director, Bureau of the Census

From: A. Mark Neuman
Chief, Office of Congressional Affairs

Subject: Background information on overseas military ("Home of Record" v. "Last six months")

ISSUE

Which form of Administrative records for overseas military personnel will be used for apportionment purposes in the 1990 Census.

BACKGROUND

On August 1, 1989, The Department of Commerce announced that overseas military personnel would be counted in the 1990 Census and included in the state apportionment counts. The Department of Defense (DOD) originally planned to conduct an overseas *enumeration*. Overseas military personnel would be apportioned in the state where the person resided continuously for at least six months prior to leaving the country. In late December of 1989, Defense Secretary Cheney notified Secretary Mosbacher that DOD would be unable to fund this operation. This unanticipated decision reopened the issue of how overseas military would be counted for apportionment purposes.

HOME OF RECORD

Home of Record is where a member of the military *enlisted* in the service. This is *not* necessarily the same state that an individual may designate as his/her stateside residence for income tax purposes.

Cons

Feasibility:

DOD testified previously (8/1/89) that "home of record" information is missing from approximately ten percent of the active duty force. There is no comparable information for civilian DOD personnel in DOD files. There is no comparable information for civilian DOD personnel in DOD files.

Other Arguments:

"Home of record" does not necessarily satisfy a reasonable concept of "usual residence".

In a limited amount of cases, "Home of record" may be a state where an individual never actually lived. (e.g.: an individual who joins the service immediately after college and whose parents have moved from one state to another

while he/she was attending school may have his/her parent's address listed as his/her "home of record" but he/she may never have lived there.)

Pros

Feasibility:

The Congressional Research Service and The Armed Services Committee Staff have advised the House Post Office and Civil Service Committee that "home of record" information is readily available for all service personnel.

Precendent:

DOD used "home of record" data for apportionment purposes in 1970.

LAST SIX MONTHS STATESIDE

DOD has what it calls longitudinal files on where service personnel resided stateside continuously for the last six months. This information is derived principally from payroll records.

Cons

In many cases, this will be a temporary duty station. (e.g.: Fort Benning, Georgia; where Rep. Tom Ridge, R-PA, was stationed continuously for six months before he was sent to Vietnam.)

Feasibility:

The Congressional Research Service (CRS) conducted a study on longitudinal files and determined that compiling data on last duty station stateside would require a *greater*

amount of effort than home of record, which CRS contends is available for *all* service personnel.

Accuracy:

CRS also reported to the House Post Office and Civil Service Committee that there would be considerably *more* error in computing data based on last six months data.

Pros

The "last six months" definition bears a significant resemblance to the Census Bureau's concept of "usual residence".

ADDITIONAL POLICY BACKGROUND

The Decision Memorandum (CD-183) to the Secretary from Undersecretary Michael R. Darby states:

> *I recommend that you approve the decision to include military and dependents overseas in the 1990 census for apportionment, provided that there is timely receipt of acceptable data from the Defense Department.*

Deputy Director Kincannon testified* before the Subcommittee on Census and Population on August 1, 1989:

> *"DOD has plans to have availible 1990 data on its overseas employees and their dependents that can be used for apportionment purposes. If it will provide that data to us in a timely manner to meet our statutory deadlines, we can include this group with comparative ease in the 1990 apportionment totals. We are working with DOD on the form and proce-*

* This testimony was prepared at the Department of Commerce.

dures to be used. We believe that our decision to include counts of overseas members and their families in the apportionment totals will satisfy Congressional concerns about the issue and will strengthen cooperation between our agency and the Congress to make the 1990 Census a success."

LEGISLATIVE AND POLITICAL CONSIDERATIONS:

The Chairman and ranking minority members of both the House and Senate Oversight full Committee and subcommittee are *strongly* supportive of the Home of record designation. (Sawyer D-OH, Ridge R-PA, Ford D-MI, Gilman R-NY, Kohl D-WI, Rudman R-NH, Glenn D-OH, Roth, R-DE). A amendment to use "last six months residence" was overwhelmingly defeated on the House Floor in the 1987, 93-317. Supporters of "home of record" could mandate its adoption through legislation, which would almost certainly enjoy broad, bi-partisan support. Sen. Bob Kasten, a member of the Commerce, State, Justice Appropriations subcommittee, is a vocal supporter of "home of record". To date; no supporters of "last six months have voiced an opinion to the Bureau.

House Oversight members feel they were at worse, misled; and at best, not informed of the Departments's intentions in a timely manner. The (3/39/90) letter to Secretary Cheney from Secretary Mosbacher was never shared, or discussed with, or announced to any member of the Committee. Previous testimony from both the Department and the Bureau indicated that no *final* decision had been made about specific residency rules using administrative records. The 3/29/90 letter suggests a clear preference for the last six months. In effect, the letter could reasonably be interpreted as instructions to the Department of Defense not to provide home of record data. The Committee Members

are highly critical of the Department's previous insistence that this was a matter up to DOD, even though the Secretary of Commerce has the sole authority to determine the form and content of the Census.

UNITED STATES DEPARTMENT OF COMMERCE
Bureau of the Census
Washington, D.C. 20233

OFFICE OF THE DIRECTOR

May 18, 1990

Honorable Thomas C. Sawyer
Chairman, Subcommittee on Census
and Population
Committee on Post Office and Civil Service
House of Representatives
Washington, DC 20515-6245

Dear Mr. Chairman:

Thank you for your cosigned letter requesting that overseas military personnel be enumerated at their "home of record." We have examined the feasibility of this, as I agreed we would do.

The Census Bureau agreed to include overseas members of the armed forces, civilian Department of Defense (DOD) employees, and their dependents in the 1990 census apportionment count because of bipartisan support in the Congress.

The DOD testified on September 7, 1989 that "home of record" in its personnel files has a high error rate. The designation may be a place where the person has not lived for many years and, in some cases, may be a place where the employee has never lived.

The DOD further testified that none of the data elements on personnel records meets a reasonable test of validity for apportionment purposes. Therefore, it had planned to conduct an enumeration survey of its personnel overseas. After the DOD cancelled its survey in December 1989, the DOD told us that its personnel

records could be used with the 6-month rule, supplemented with a small survey, to produce data from its personnel records that are superior to the "home of record" data. The 6-month rule approximates the Census Bureau's concept of "usual residence," the basis on which other U.S. citizens are counted.

Because DOD stated that data on the "last six months" of residence in the United States are superior to "home of records" data. The 6-month rule approximates the Census Bureau's concept of "usual residence," the basis on which other U.S. citizens are counted.

Because DOD stated that data on the "last six months" of residence in the United States are superior to "home of record" and because the "last six months" data are most closely comparable to the "usual residence" definition used for enumeration in the 1990 census, the Secretary of Commerce wrote the enclosed letter to the Secretary of Defense on March 29, 1990 on procedures for counting overseas military and dependents using the "last six months" rule.

Therefore, given the DOD testimony and the information supplied to us by the DOD, we cannot now accede to your request to base the military apportionment on "home of record." However, should DOD reexamine its evidence and provide an acceptable methodology and ultimately data (by October 31,1990) based on "home of record," we would be in a position to go forward on the basis of the new evidence.

It is our understanding that the DOD needs to decide on its reference period by June 1, 1990 to produce the data in time for apportionment. So, it appears to me, that any DOD reexamination of the evidence and resulting change, if any, in its methodology must occur very soon indeed.

Thank you for your continued interest in the 1990 census.

Sincerely,

/s/ BARBARA EVERITT BRYANT
Barbara Everitt Bryant
Director
Bureau of the Census

Enclosure

[identical letter sent to Representative William D. Ford, Chairman, House Committee on Post Office and Civil Service (A.R. 832-833)]

[SEAL]

THE SECRETARY OF COMMERCE
Washington, DC 20230

MAR 29 1990

Honorable Richard Cheney
The Secretary of Defense
Washington, D.C. 20301

Dear Dick,

Thank you for your letter regarding the Enumeration of Department of Defense (DOD) Personnel and Dependents Overseas.

We are pleased to let you know that, although we are unable to fund a DOD enumeration of these groups, an alternative counting procedure has been worked out in cooperation with the Department of Defense. This procedure, involving several different forms of documentation, if completed in a timely manner, should provide a significant improvement in accuracy over the previous practice of relying solely on administrative home-of-record data for overseas counts.

Very briefly, the DOD will provide counts of *overseas military* personnel on the basis of current information about their last United States address of six months duration or longer. It will also provide counts of *military dependents* from administrative records using the same state of residence for these dependents as that recorded for their sponsors. *Federal civilian employees and their dependents* will be counted by means of a combination of administrative records and a short, self-administered questionnaire to obtain their state of residence. Finally, DOD's legal staff for the Department is currently pursuing the question of whether so-called *"non-appropriated fund*

employees" should be included in the count at all. If they are ultimately included, the Census Bureau and DOD will work out appropriate procedures for counting them. The Census Bureau is continuing to work with the Defense Manpower Data Center to achieve our mutual goal of an accurate count at minimal cost.

We are confident that, by continuing to work with Department of Defense officials to ensure that these arrangements are fully implemented, these Americans can be included in the Census count for apportionment purposes. The Department of Commerce is especially pleased to be able to institute this program for the Bi-centennial Census.

Sincerely,

/s/ ROBERT A. MOSBACHER
Robert A. Mosbacher

Identical letters were sent to:

Honorable Thomas C. Sawyer
Chairman, Subcommittee on Census and
Population
Committee on Post Office and Civil Service
House of Representatives
Washington, DC 20515-6245

Dear Mr. Chairman:

Honorable Willam D. Ford
Chairman, Committee on Post Office
and Civil Service
House of Representatives
Washington, DC 20515-4209

Dear Mr. Chairman:

Honorable Thomas J. Ridge
Ranking Minority Member
Subcommittee on Census and Population
Committee on Post Office and
Civil Service
House of Representatives
Washington, DC 20515-3824

Dear Mr. Ridge:

Honorable Benjamin A. Gilman
Ranking Minority Member
Committee on Post Office and
Civil Service
House of Representatives
Washington, DC 20515-3222

Dear Mr. Gilman:

Dear Mr. Gilman:

CRS REPORT FOR CONGRESS

The 1990 Census: Including Foreign-Based Military and Civilian Personnel in the State Counts

David C. Huckabee
Analyst in American National Government
Government Division

June 20, 1990

Congressional Research Service • The Library of Congress

THE 1990 CENSUS: INCLUDING FOREIGN-BASED MILITARY AND CIVILIAN PERSONNEL IN THE STATE COUNTS

SUMMARY

The Commerce Department's decision to include foreign-based Federal personnel and their dependents in the counts used for reapportioning the House of Representatives may affect the allocation of seats. Since a significant portion of this population of more than a million persons will be active duty military personnel, and at the time of this writing the only data available to analyze are from the Department of Defense, this report's focus is on Defense Department personnel. The allocation of personnel for all agencies participating in this program will be done using administrative records rather than a special overseas census. The Defense Department has three different alternative data sources that could be used for this purpose. These are using a person's: (1) *home of record*; (2) *legal residence*; or (3) *last duty station*. Each of these methods has strengths and weaknesses. Each has the potential of altering the apportionment of seats, but *home of record* is least likely to do so, followed in order by *legal residence* and *last duty station*.

The data presented in this report, and the appendices which follow, illustrate the sensitivity of the apportionment formula to small shifts in State populations. Although the Census Bureau decision to account for foreign-based personnel may not alter the total number of House seats assigned to each State, adding these people to each State's count very likely will change the order of the assignment of seats, and, under certain circumstances, the apportionment calculations may be altered enough to shift seats among the States.

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* Not reproduced in appendix.

THE 1990 CENSUS: INCLUDING FOREIGN-BASED MILITARY AND CIVILIAN PERSONNEL IN THE STATE COUNTS

INTRODUCTION

For the first time since 1970 and the second time in history, the Census Bureau will include non-resident Federal employees in State counts used for reapportioning the House of Representatives. The Bureau included the foreign-based military personnel in the State counts used for reapportionment in 1970 during the Vietnam War, based on their *home of record.*[1] In 1990, the Census Bureau plans to include not only the foreign-based military personnel in the State counts, but also civilian employees of the Federal Government and the dependents of both the military and civilian personnel, based on the *last duty station* of the personnel for the six months prior to the assignment outside the U.S.[2] Although the Bureau expects that most of the persons counted in this exercise will be the military and civilian employees of the Department of Defense (and their dependents), other agencies with foreign-based employees have been asked to participate as well.[3]

---

[1] U.S. Department of Commerce. Bureau of the Census. Procedural History: 1970 Census of Population and Housing. PHC(R)-1, Washington. U.S. Govt. Print. Off. 1976. p. 5-31. (See note five for a definition of *home of record.*)

[2] U.S. Congress. House. Committee on Post Office and Civil Service. Subcommittee on Census and Population. Census Equity Act. Statement of C. Louis Kincannon, Deputy Director, Bureau of the Census. Washington. U.S. Govt. Print. Off. Aug. 1, and Sept. 7, 1989, p. 45.

[3] In early March 1990, the Census Bureau wrote each of the agencies identified by OMB as having foreign-based employees, requesting that they report counts of their employees by State for apportionment purposes. In the enclosures accompanying the letter were guidelines

This deviation from the Census Bureau's traditional rule that a person should be counted at his or her *usual residence* (the place a person lives and sleeps most of the time)[4] could affect the reapportionment of House seats. The decision to count foreign-based military personnel in the States that they designated as their *home of record* in 1970 caused a shift of a seat from Connecticut to Oklahoma by fewer than 300 persons. The Bureau's decision to include Federal personnel and their dependents in the 1990 counts could affect the apportionment as well.

Two bills were introduced on May 23, 1990, to direct the Census Bureau to use a person's *home of record* for this exercise in 1990, rather than the *last duty station* concept as proposed by the Census Bureau. H.R. 4903 (Rep. Ridge, et. al.) and S. 2675, (Sen. Kohl, et. al.) both provide that the Census Bureau will ensure that foreign-based military personnel will be counted in their home State's

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for determining the State of residence of the foreign-based employees and their dependents. The agencies were directed to "consider as the 'State of Residence' the U.S. State that the person claims as his/her home when he/she is overseas. It is *not necessarily* the individual's official duty station or place of work." U.S. Department of Commerce. Bureau of the Census. Office of the Director. Sample Letter to Agency Heads. March 6, 1990. Enclosure B.

In a June 14, 1990 conversation with Al Paez, Chief, Data Requirements Branch, Decennial Planning Division of the Census Bureau, CRS learned that the Bureau expects to receive responses from all the agencies surveyed, but some may not be able to provide all the necessary information. Agencies whose foreign-based personnel are not acknowledged for security reasons, such as the CIA, DIA, and NSA, will likely not report this information to the Bureau.

[4] U.S. House of Representatives. Committee on Post Office and Civil Service. Inclusion of Overseas Federal Personnel in Censuses of Population. Report to Accompany H.R. 4720. House Report No. 100-953, 100th Cong., 2nd Sess. Washington D.C., U.S. Govt. Print. Off., 1988. p. 2.

Census totals using the *home of record* concept as defined by the Department of Defense.[5]

The method by which the foreign-based personnel are distributed may determine the impact, if any, on the apportionment of seats by the Census. In 1988, the Department of Defense (DOD) estimated "that between 1.2 and 1.6 million persons under its purview" were stationed outside the U.S. An additional 13,000 non-Defense Department government employees were estimated to be foreign-based as well.[6] Based on December 31, 1989, DOD data, 719,289 active duty military personnel were stationed outside the U.S. as of that date.[7] As of September 30, 1989, the DOD reported that 366,920 dependents of foreign-based members were outside the country, but the State residencies of these dependents had not been determined at this writing.[8]

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[5] U.S. Department of Defense. The Joint Federal Travel Regulations. Volume 1, Uniformed Services Members. Appendix 1. 1988.

"A Home of Record is the place recorded as the home of the individual when commissioned, appointed, enlisted, inducted, or ordered into the relevant tour of active duty. The place recorded as the home of the individual when reinstated, reappointed, or reenlisted remains the same as that recorded when commissioned, appointed, enlisted, or inducted or ordered into the relevant tour of active duty unless there is a break in service of more than one full day. Only if a break in service exceeds one full day, can the Home of Record be changed by the Member."

[6] Inclusion of Overseas Federal Personnel in Censuses of Population, p. 3.

[7] U.S. Department of Defense. Office of the Assistant Secretary of Defense. Force Management and Personnel. Defense Manpower Data Center (DMDC). Active Duty Overseas Associated With State by Home of Record, Legal Residence and Last Duty Station, 31 December 1989. (Typescript).

[8] U.S. Department of Defense. Directorate for Information Operations and Reports (DIOR). Worldwide Manpower Distribution by

METHODS OF "COUNTING" DOD PERSONNEL

At the time that the Bureau decided that it would include foreign-based DOD personnel in the State counts used for reapportionment, an actual enumeration by means of a questionnaire was envisioned. The Defense Department would have borne the cost, and the Census Bureau would have assisted the DOD in producing a questionnaire. In December 1989, the Secretary of Defense wrote the Secretary of Commerce, stating the DOD would be unable to provide funds for the questionnaire. Instead, the DOD agreed to provide the necessary information from automated administrative records.[9] Thus the DOD response will be in a form similar to the other agencies participating in this program. Since the vast majority of the persons to be added to the State counts will be DOD personnel (all but approximately 13,000), this analysis will focus on the DOD data which could be used for the task.

Alternate DOD Data Files

Department of Defense automated records which could be used to adjust the census apportionment population to account for the foreign-based military personnel and their dependents include: (1) the officer and enlisted active duty files; (2) the Joint Uniformed Military Pay System (JUMPS) files; (3) the Military Entrance Processing Command data (MEPCOM) files; and the Dependents Eligibility Reporting System (DEERS) files.

Geographical Area. September 20, 1989. p. 71. The DMDC is planning on assuming that personnel who are reimbursed for bringing their families overseas—an accompanied tour—will have done so. In fact, some families do not accompany members on accompanied tours, and some personnel pay the expenses of having their families with them, so this measure will only approximate the number of dependents.

[9] Telephone conversation with Emma Moreno. Office of Congressional Affairs. Bureau of the Census. June 1, 1990.

Data elements in these files suggest three methods that could be used to "repatriate" military personnel and their dependents to the States for purposes of reapportionment. These are *home of record* which is "declared by the member at entry and reflects the State to which he or she will be moved upon separation"[10] (available on the officer and enlisted active duty personnel files); "*legal residence* which is the "State of residence a member declares for tax purposes"[11] (available on the JUMPS files); and *last duty station* in the U.S. (available on the officer and enlisted active duty personnel files).

The Defense Manpower Data Center (DMDC) provided a table to the Assistant Secretary of Defense for Force Management and Personnel in May 1990, listing foreign-based active duty personnel as of December 31, 1989. Data from this table is reproduced in appendix 1. Of the 719,289 foreign-based active duty personnel, records of State locations were most complete in the JUMPS file with 6,143 unknowns (.85 of the total), followed by 29,748 unknowns in the *last duty station* list (4.14 percent), and 51,379 unknowns based on *home of record* (7.14 percent).

The *last duty station* listing was produced by using the most recent automated active duty officer and enlisted personnel files in conjunction with the military entrance processing command data (MEPCOM) files. These files are updated quarterly, so DMDC compared the December

[10] U.S. Department of Defense. Office of the Assistant Secretary of Defense. Force Management and Personnel. Defense Management Data Center (DMDC). DMDC Procedures Used in Determining Relevant CONUS Locations of Active Duty Overseas Personnel. (Typescript). May 19, 1990.

[11] Ibid.

31, 1989, personnel files with the September 30 files; if a duty station matched in the United States for an individual, that duty station was deemed to be his last duty station. If no match occurred, similar attempts were made using the quarterly data files back to June of 1982. It should be noted that this listing does not necessarily identify the *last duty station* where the member resided for the *six months* prior to the foreign assignment.[12] Instead, it shows the last stateside duty station regardless of the length of time the service member spent at this location. The last duty station where the member spent a total of six months could be determined from these data files but was not done in this case.

The *home of record* listing was also produced by using the most recent automated active duty officer and enlisted personnel files. No effort was made to cross-check the unknowns with other files or earlier versions of the same file. Although earlier versions of this file and the MEPCOM file may reduce the number of unknowns, the *home of record* is an entry which rarely changes. Thus, the same methods which reduced the *last duty station* unknowns to 29,748 may not be as successful for *home of record*. One way of reducing the *home of record* unknowns would be to use the *legal residence* variable in the JUMPS files to substitute for *home of record* if the *home of record* cannot otherwise be determined.

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[12] The six-months-residency requirement is the rule that was envisioned by the Census Bureau and is consistent with H.R. 4720, a bill introduced by Representative Dymally in the 100th Congress, that was reported by the Post Office and Civil Service Committee on September 22, 1988. The bill subsequently failed passage by a vote of 93-317 on September 28, 1988. U.S. Congress. House. Committee on Post Office and Civil Service. Inclusion of Overseas Federal Personnel in Census of Population. Report No. 100-953; 100th Congress, 2d Sess. Washington. U.S. Govt. Print. Off., 1988.

The State of residence a member declares for tax purposes—available on the JUMPS (payroll) files—makes up the *legal residence* listing. (Home State data for nonmilitary Federal employees may only be available from payroll records.)

CHOOSING AN ADMINISTRATIVE METHOD TO "COUNT" THE FOREIGN-BASED DOD PERSONNEL: POLICY ALTERNATIVES

Each of the Defense Department's alternatives for counting the foreign-based military personnel has its own strengths and weaknesses. The *home of record* method may well reflect the person's own concept of his or her home State, but at the end of a person's term of Federal service, he or she may not return to that State. The *legal residence* method reflects the State to which the person chooses to pay his or her taxes, but a person may choose a low or no tax State to claim as a legal residence.[13] The *last*

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[13] It is not clear how easy or difficult it is for military personnel to claim a State for tax purposes. The Soldiers and Sailor's Relief Act (U.S.C. 50 App. 574) provides that persons transferred in military service "shall not be deemed to have lost a residence or domicile in any State, Territory, possession, or political subdivision . . . solely by reason of being absent therefrom in compliance with military or naval orders." This provision does not prohibit military personnel from changing their residences for tax purposes. Instead, it allows them to maintain previously held legal residences for tax purposes when they move pursuant to military orders. Presumably, one would need some form of tie with a State, such as property ownership, or having been stationed in a State in order to change a legal residence, but it is interesting to note that the nine States with either no income taxes, or those which tax only interest and dividend income, have approximately 9 percent more of the overseas military personnel claiming the States for tax purposes, than those same States receive using *home of record*. Two of the States, Florida and Texas, account for approximately 7 percent of the difference. This is not to say that only low, or no, tax

duty station for the six months prior to receiving the foreign assignment method may reflect the place where the person last resided—a concept that is comparable to the Census Bureau's *usual residence* rule. But the *last duty station* may not necessarily indicate the State where a person lives because a person's duty station may be in a different State than where he or she resides. If approximating the *usual residence* rule is most important consideration in apportioning the foreign-based DOD personnel to the States for the 1990 Census, then one could argue that *last duty station* is the appropriate choice because it best approximates the *usual residence* rule. But one could argue contrarily, since "repatriating" the foreign-based DOD personnel is a violation of the *usual residence* rule, that other criteria should be considered.

State-by-State Distributions

One possible criterion for evaluating the alternative methods of counting DOD personnel, is how the State-by-State distributions of personnel compare to the distribu-

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States receive "bonuses" of personnel using *legal residence* as compared to *home of record*. California receives a nearly 1 percent bonus, even though the States ranks 39 out of 50 in tax income derived from income taxes (based on 1985 tax collections ranked from smallest to largest).

In 1985, the range of tax revenue obtained by the States from income taxes range from 0 to 66 percent of the State's total tax revenue. The median percentage was 29.6 percent. Eleven states with income tax collections below the median using *legal residence* gained foreign based military as compared to *home of record*. Four States exceeding the median incme tax receipts also gained using the *legal residence* distribution over using *home of record*. These data were calculated from data contained in The Council of State Governments. *The Book of the States*, 1988-89 Edition. Table 6.7: State General Revenue, By Source and By State: 1985., p. 234.

tion of the total U.S. population among the States. Appendix I reports these data for each State, as well as summary statistics for each proposed alternative. Based on this criterion, allocating personnel based on the *home of record* is closest to the population distribution of the entire population. *Legal residence* varies from the distribution of the entire population nearly three times as much as *home of record*, and *last duty station* varies ten times as much.[14]

Another possible criterion for judging whether to choose one method of counting over another would be to check to see how each method would affect the apportionment of seats in the House of Representatives.

Reapportionment Implications

The reapportionment process for the House is based on rounding principles, but the actual process is carried out on computers by means of computing a "priority list" of seat assignments for the States. The First fifty seats are constitutionally mandated because each State must have at

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[14] The variance of *home of record* from the projected 1990 population distribution used in Appendix 1 was .38. The variance for *legal residence* was 1.09, while the variance for *last duty station* was 3.98.

The variance measures the degree to which individual values in a list vary from the average (mean) of all the values in the list. High variances indicate that the values vary greatly; low variances mean the values are similar. If all values in the lists are identical, the variance is zero.

Another way of looking at the differences between the measures would be to sum the difference each of three alternatives and the projected 1990 population distribution. This results in a sum of the differences for *home of record* of .00000000000001, but using the absolute value in this exercise (summing the variances disregarding the sign) produce a total of 17.08. The same procedure for *legal residence* yields a sum of the differences of 7.06 and an absolute value of 26.39. Interestingly, the sum of the differences regardless of sign for *last duty station* is .000000000000002, but the absolute value is 66.33.

least one Representative.[15] The remaining 385 seats (for a total of 435) are assigned by means of priority list (see appendix 2). The priority list method has been used by the Census Bureau to apportion the House since early in the 20th century. The priority list is a useful tool for identifying which States either are in danger of losing a House seat or those States that just missed gaining or retaining a seat.[16]

Since the apportionment of seats in the House varies in proportion to the distribution of the population among the States, the DOD personnel allocation method which best matches that proportional distribution will be least likely to affect the apportionment of House seats. From the analysis described above, *home of record* would be less likely to affect the apportionment than either *legal residence* or *last duty station*. Very small differences in populations, can affect apportionments (and have done so). In fact, as mentioned previously, the decision to allocate the foreign-based military personnel in 1970 based on *home of record* resulted in Oklahoma receiving a seat that Connecticut would have otherwise obtained.

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[15] Article I, Section 3, of the Constitution as modified by clause 2 of the Fourteenth Amendment requires that "Representatives and direct taxes shall be apportioned among the several States . . . according to their respective numbers."

[16] The "priority list" rankings are calculated using the reciprocals of the geometric means of successive numbers ($1/\sqrt{n(n-1)}$ where "n" is the number of seats to be allocated to the State). The geometric mean (the square root of the product of two adjacent numbers) was chosen as the rounding point rather than the arithmetic mean (the midpoint between two adjacent numbers) by the Congress in 1941. For a detailed explanation of how the apportionment formula works see: U.S. Library of Congress. Congressional Research Service. Apportioning Seats in the House of Representatives: The Method of Equal Proportions. Report 88-143 GOV, by David C. Huckabee. Washington, 1988.

Appendix 2 and table 1 below, illustrate the volatility of the apportionment formula by displaying the "priority lists" of House seat assignments around the last (435th) seat allocated in the House. Two of these DOD allocation methods (*home of record* and *legal residence*) *in this example* do not change the apportionment (but they do somewhat change the *order* in which the seats are assigned).[17] The apportionment based on *last duty station*, however, shifts a seat from Wisconsin to Georgia. From the distribution percentages in appendix 1 alone, California would appear more likely than Georgia to gain a seat. Table 1, shows, however, that Georgia just misses the 435th position by 16,669 persons using *home of record.*[18] The allocation based on *last duty station* alters the calcuations enough to enable Georgia to displace Wisconsin to take the 435th position. Thus, Wisconsin would need to gain 13,226 *additional* persons to retain its 9th seat using *last duty station*, and 12,289 *fewer* persons to lose its 9th seat using *home of record.* California by contrast would need 47,758 fewer persons to obtain another seat using *last duty station* compared to *home of record*, but the State's relative position (439) stays the same. This example illustrates that the States most likely to be affected are those right at the margin of gaining or losing a seat rather than a seat going to the State that gains the most in the DOD personnel allocation (unless, of course, that State is very close to the margin). It should be noted that this illustration uses only one of four different Census Bureau

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[17] Different population projections will likely result in different priority rankings, and hence different States ranked at, or near the 435th seat cutoff.

[18] This example, and all the others in table 1, are based on the assumption that the State population needed to gain or lose a seat is calculated for each State assuming all other State populations remain unchanged. In all likelihood, if one State's population were to be adjusted in some fashion, other State's populations also would change.

projections of population for 1990, and that other projections (and the actual Census results) may place different States adjacent to the 435th seat. It should also be noted that these calculations only account for the foreign–based military personnel. Data on dependents and civilian personnel were not available at the time this report was prepared.

FORM CD-183
(REV. 3-88)

U.S. DEPARTMENT OF COMMERCE

ABSTRACT OF SECRETARIAL CORRESPONDENCE

TO: ☒ The Secretary ☐ The Deputy Secretary Control No.:

Date:

DECISION MEMORANDUM

From: Michael R. Darby
Under Secretary for Economic Affairs

Prepared by: B.E. Bryant/Census/US EA/763-5190

SUBJECT: Counting the Overseas Military and Civilian Employees in the Decennial Census

BACKGROUND: This memorandum is to follow up on your July 6 conversation with Senator Herbert Kohl (D-WI), Chairman of the Subcommittee on Government Information and Regulation that oversees the Census Bureau.

Reacting to bipartisan Congressional support, the Department of Commerce has agreed to include the number of overseas U.S. military and Federal civilian employees and their dependents living with them in the 1990 apportionment counts. You sent a letter to Defense Secretary Richard Cheney stating the Census Bureau is intending to use data provided by the Department of Defense (DOD) based on the last U.S. address of 6 months duration or longer. Census Bureau Director Barbara Bryant later wrote to Chairman William D. Ford and other Congres-

sional members reiterating that position unless the DOD showed compelling reasons to use other information.

Based on new information supplied to the Department of Commerce by senior Defense Department officials, it appears now that DOD does not have the capacity to assemble data on the last U.S. address (residence) of 6 months duration. Service personnel declare their home of record upon entry into the service and upon reenlistment. Home of record follows the enlistee throughout his or her tour and is used to determine the travel stipend granted upon discharge. Approximately 10 percent of DOD's personnel files do not list a "home of record." The DOD now believes it can collect these missing data through a new survey currently under review by the Office of Management and Budget.

Legislation directing the Secretary of Commerce to include overseas military members and their dependents in the apportionment counts based on "home of record" data passed the House on June 25, 1990. The Senate Government Affairs Committee is scheduled to consider a corresponding proposal, S. 2673 (introduced by Sen. Kohl), this Friday, July 13, 1990.

RECOMMENDATION: Based on new information from DOD, which indicates that the complete "home of record" data will constitute the most accurate data available from the Department of Defense, I recommend that the Department of Commerce express no objections to the passage of the Senate bill (S. 2673). We believe that the new "home of record" data, supplemented with additional information DOD plans to collect, will satisfy our criterion that the best quality data be used for the 1990 census.

DECISION:

Approve _____ X_____ Disapprove _____

	PREPARED BY	CLEARED BY	CLEARED BY
SURNAME & ORGANIZATION (Please type)	BEBryant Dir./Census	CAO/Census	Ch.C./EA
INITIALS AND DATE	*B.E.Bryant* 7-10-90	*Ann* 7/10/90	7-11

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FORM CD-183
(REV. 3-88)

U.S. DEPARTMENT OF COMMERCE

ABSTRACT OF SECRETARIAL CORRESPONDENCE

TO: ☒ The Secretary ☐ The Deputy Secretary Control No.:

Date:

INFORMATION MEMORANDUM

From: Michael R. Darby
Under Secretary for Economic Affairs

RE: Including Overseas Military Personnel in 1990 Census Count

Summary: An agreement has been reached with the Department of Defense to include overseas military personnel and their dependents in the 1990 census counts to be used for reapportioning the U.S. House of Representatives. Such persons will be included in the counts based on the home of record designated in their personnel files. It is expected that nearly one million persons will be added to the reapportionment counts as a result.

Background: In June 1989, the Department of Defense (DOD) requested that the Department of Commerce include overseas military personnel and their dependents in the 1990 census reapportionment counts. Excepts for the 1970 census, when DOD had supplied the data necessary to include such persons, overseas military personnel and their dependents had not traditionally been included in the decennial census counts due partially to the infeasibility of achieving an accurate count of such persons.

In order to ensure accuracy of the 1990 census, DOD proposed to conduct a special enumeration of its overseas personnel and their dependents. At that time, proposed legislation to mandate inclusion was being considered by Congress and appeared to have strong bipartisan support. Based on these factors, we agreed to include such individuals in the 1990 reapportionment counts.

In December 1990, DOD informed us that, due to budget constraints, it could not fund the overseas enumeration project and requested that Commerce fund the project or, alternatively, accept counts based on existing administrative records. Due to our own budget constraints at that time, we could not fund the overseas enumeration but agreed to accept data from existing DOD records provided that the data were received on a timely basis and were of sufficient quality for reapportionment purposes. While a DOD official had previously testified that existing data did not meet "a reasonable test of validity for apportionment purposes," DOD assured us in December that such data would be supplemented and improved by methodologies devised by technical experts who designed the overseas enumeration.

Earlier this month, DOD identified three alternative means for determining the home state affiliation of overseas military personnel. The alternatives are legal residence, home of record and last U.S. duty station. After reviewing these methods, we decided to use home of record as the basis for including overseas personnel and their dependents in the count. Census Bureau technical staff believe that among these, home of record is the most consistent with the concept of "usual residence" used for two centuries as the basis for determining residency in the decennial census.

In a recent letter to House Armed Services Committee Chairman Les Aspin, Assistant Secretary of Defense Christopher Jehn stated that last duty station most closely approximates the "usual residence" concept. However, because last duty station merely reflects the location of the facility to which a person is assigned, many military personnel and their dependents would be counted in states other than their actual previous U.S. residence (such as those assigned to the Pentagon, who would be counted as D.C. residents even though they lived in Maryland or Virginia). The option of using legal residence was rejected because in many cases legal residence may be a place where the person has never lived.

While Assistant Secretary Jehn's letter indicated that approximately ten percent of DOD's personnel files are missing home of record data, DOD has agreed to use all automated records available to supplement these files in order to provide data of sufficient quality for apportionment purposes. Bureau staff will work closely with DOD staff to assure the quality of those data.

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SURNAME & ORGANIZATION (Please type)	L. West	Fifi	C/C
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[SEAL]
UNITED STATES DEPARTMENT OF COMMERCE
BUREAU OF THE CENSUS
Washington, D.C. 20233

OFFICE OF THE DIRECTOR

July 13, 1990

MEMORANDUM FOR Michael R. Darby
Under Secretary for Economic Affairs

From: Charles D. Jones (Signed) Charles D. Jones
Associate Director for Decennial Census

Subject: Overseas Military

Given all the information currently available to us, the technical staff of the Census Bureau believes that the Home of Record comes closest to the concept of the Usual Residence among the three data sources that DoD has available.

We recommend that we use the Home of Record for the inclusion of overseas military in the apportionment counts with the details of the procedures to be worked out by the technical staffs of DoD and the Census Bureau.

EXHIBIT D

[SEAL]
UNITED STATES DEPARTMENT OF COMMERCE
The Under Secretary for Economic Affairs
Washington, D.C. 20230

July 23, 1990

Honorable Thomas C. Sawyer
House of Representatives
Washington, D.C. 20515

Dear Mr. Sawyer:

As you are aware, the Department of Commerce (DOC) reached an agreement with the Department of Defense (DOD) last year to include overseas military personnel and their dependents in the 1990 census counts to be used to reapportion the U.S. House of Representatives. It was agreed that the home state affiliation of such persons would be determined in a manner as consistent as possible with the concept of "usual residence" used by the Census Bureau for two hundred years to count the nation's population.

After reviewing the alternative data sources identified by DOD for providing such counts, DOC has decided to use home of record designations in existing DOD administrative records rather than the legal residence or last U.S. duty station of military personnel to determine home state affiliation. Census Bureau technical staff believe that home of record is most consistent with our policy for determining residency.

In a recent letter to House Armed Services Committee Chairman Les Aspin, Assistant Secretary of Defense Christopher Jehn stated that last duty station most closely approximates the "usual residence" concept. However, be-

cause last duty station merely reflects the location of the facility to which a person is assigned, many military personnel and their dependents would be counted in states other than their actual previous residence (such as those assigned to the Pentagon, who would be counted as D.C. residents even though they lived in Maryland or Virginia). The option of using legal residence was rejected because in many cases legal residence may be a place where the person has never lived.

While Assistant Secretary Jehn's letter indicated that approximately ten percent of DOD's personnel files are missing home of record data, DOD has agreed to use all automated records available to supplement these files in order to provide data of sufficient quality for apportionment purposes. Bureau staff will work closely with DOD staff to assure the quality of those data.

Sincerely,

/s/ MICHAEL R. DARBY

Michael R. Darby
Under Secretary
for Economic Affairs

[Identical letters were sent to Senator Herbert H. Kohl (A.R. 926) and Representative Les Aspin (A.R. 927)]

[SEAL]
UNITED STATES DEPARTMENT OF COMMERCE
The Under Secretary for Economic Affairs
Washington, D.C. 20230

September 11, 1990

Honorable John W. Warner
United States Senate
Washington, D.C. 20510-4601

Dear Senator Warner:

Thank you for your cosigned letter inquiring about the method to be used by the Department of Defense (DOD) for counting its overseas personnel. We requested that DOD furnish these data, which will be combined with counts from other Federal entities and results of the 1990 census for reapportioning seats in the House of Representatives. As required by Title 13, United States Code, we will be delivering the reapportionment counts to the President before the end of the year.

After considering the three alternatives discussed with DOD for developing their military personnel counts, we concluded that the "home-of-record" data best satisfy our technical and conceptual needs, despite the absence of state designations for about 7 percent of DOD's overseas personnel records. To fill this gap, staff of the Defense Manpower Data Center (DMDC) will use supplemental data from their automated records. We understand that the number of missing state designations will be negligible.

Among DOD's alternative counting methods, the home-of-record data are the most compatible with our concept of usual residence, a principle directed by the Congress in the Census Act of 1790. Military personnel designate their home of record upon entry into the Armed Forces and upon re-enlistment; this designation generally remains

with each member until discharge or retirement and is used to determine the travel stipend at the conclusion of military service.

"Last duty station," the main alternative to home of record, reflects the general location of the duty post where a military person is assigned. Those assigned to the Pentagon, for example, would be counted as residents of the District of Columbia even though they lived in Virginia or Maryland. As a result, military personnel and their dependents would be designated with jurisdictions other than their actual previous residence in the United States. Another alternative, "legal residence," was rejected because personnel may designate a place where the employee was assigned at any point during military service, no matter how brief the assignment or how distant in time. We do not use "legal residence" in the census.

Thank you for your interest in the 1990 census.

Sincerely,

/s/ Mark W. Plant for

Michael R. Darby
Under Secretary
for Economic Affairs

[Identical letters were sent to Senators Pete Wilson (A.R. 933-934), Charles S. Robb (A.R. 935-936), Alan Cranston (A.R. 937-938), Sam Nunn (A.R. 939-940), and Wyche Fowler, Jr. (A.R. 941-942)]

[SEAL]
UNITED STATES DEPARTMENT OF COMMERCE
BUREAU OF THE CENSUS
Washington, D.C. 20233

OFFICE OF THE DIRECTOR

[AUG 15, 1990]

Dr. Hermann Habermann
Chief, Statistical Policy Office
Office of Information and Regulatory
Affairs
Office of Management and Budget
Washington, D.C. 20503

Dear Hermann:

Thank you for your letter concerning the inclusion of overseas Department of Defense (DOD) employees and their dependents in the 1990 apportionment counts. Since your letter, several developments have occurred on this issue. The following information explains those events and our current plans for including overseas DOD military and civilian employees and their dependents in the census.

On March 29, 1990, Commerce Secretary Robert A. Mosbacher wrote to Defense Secretary Richard Cheney stating that, for the purpose of including military members in the 1990 apportionment counts, the Census Bureau intended to use data provided by the DOD based on the last U.S. address of 6 months duration or longer. I later wrote to Representative William D. Ford, Chairman of the House Post Office and Civil Service Committee, and several other Congressional members reiterating that position unless the DOD could show compelling reasons to use other information.

Legislation directing the Secretary of Commerce to include overseas military personnel and their dependents in

the apportionment counts based on DOD "home of record" data passed the House on June 25, 1990 and was under consideration in the Senate.

In a July 11 response to a letter from Chairman Les Aspin of the House Armed Services Committee that questioned the type of data available from DOD's administrative records, the Assistant Secretary of Defense for Force Management and Personnel stated that DOD's personnel files could show home state affiliations three different ways: by legal residence, by last duty station in the United States, or by "home of record."

According to DOD's letter, however, the agency does not have readily available information to determine with precision the state in which its overseas members last maintained an actual residence in the United States. By using DOD's data on last duty station, for example, military personnel whose last work assignment in the United States was the Pentagon would show as being located in Washington, D.C. In actuality, that person may have resided in Virginia, Maryland, or the District of Columbia.

The DOD's "home of record" data, on the other hand, are provided by service personnel upon entry into the armed forces and upon reenlistment. "Home of record" follows the enlistee throughout his or her tour of duty and is used to determine the travel stipend granted upon discharge. While DOD acknowledged in its July 11 letter that "home of record" data include the greatest number of "unknowns," it pledged to use all available automated records to provide the necessary data to assist the Census Bureau in fulfilling its responsibilities. The DOD believes that the use of its automated records will "improve the quality of the data sufficient for purposes of reapportionment."

Based on this information from DOD and given the strong Congressional support for the use of "home of

record" data, the Department of Commerce agreed on July 13, 1990 to use this administrative data set, supplemented with additional information from DOD's automated records, as the basis for including the number of overseas military personnel and their dependents in the 1990 apportionment counts.

To obtain counts of its overseas civilian employees and their dependents, DOD will use a combination of administrative records and a short, self-administered questionnaire to collect the necessary information on their last stateside residence. The Office of Management and Budget approved the request for the survey on July 2, 1990, and we understand that DOD will begin data collection shortly. The DOD's counting methods will ensure against double counting individuals in situations where overseas dependents of military members also are employed by a component of DOD.

In a similar arrangement with other Federal agencies, the Census Bureau will include counts of their overseas civilian employees based on data from administrative records provided by participating agencies.

I trust this information is sufficient to explain our plans for including Federal military and civilian employees and their dependents living with them in the 1990 population counts used for apportionment purposes. My staff will continue to work with technical specialists at the DOD on the details of the procedures to be used. This will help to achieve our mutual goal of using the best quality data for the 1990 census.

Thank you for your interest. Please contact me if you have any further questions.

Sincerely,

/s/ C. F. KUICANI
for Barbara Everitt Bryant
Director
Bureau of the Census

STIPULATION OF FACTS

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No.: 91-11234 WD

COMMONWEALTH OF MASSACHUSETTS, EDWARD F. BERLIN AND KAREN J. KEPLER, PLAINTIFFS,

v.

ROBERT MOSBACHER, AS SECRETARY OF THE UNITED STATES DEPARTMENT OF COMMERCE; MICHAEL DARBY, AS UNDERSECRETARY OF ECONOMIC AFFAIRS OF THE UNITED STATES DEPARTMENT OF COMMERCE; THE BUREAU OF THE CENSUS; BARBARA BRYANT, AS DIRECTOR OF THE BUREAU OF THE CENSUS; GEORGE HERBERT WALKER BUSH, AS PRESIDENT OF THE UNITED STATES; AND DONNALD K. ANDERSON, AS CLERK OF THE UNITED STATES HOUSE OF REPRESENTATIVES, DEFENDANTS.

STIPULATION OF FACTS

The parties stipulate, for purposes of this litigation only, that the facts set forth in these stipulations are true. By so stipulating, the parties do not admit that anything set forth herein, or in any document referenced in or attached to this Stipulation, is relevant or material to any issue in this case. As to the documents attached as Exhibits to this Stipulation or referenced in the Administrative Record, the parties stipulate that those documents are true and authentic copies of the originals, were authored by

the agencies and/or persons whose names appear thereon, and are what they purport to be.

COUNTING FEDERAL OVERSEAS EMPLOYEES

1. The federal decennial census is conducted pursuant to the requirement imposed by the Fourteenth Amendment and Article I, Section 2, Clause 3 of the U.S. Constitution to enumerate "the whole number of persons in each state" as the basis for apportionment of seats in the U.S. House of Representatives.

2. Subject to the requirements of Article I, Section 2, Clause 3, and the 14th Amendment to the U.S. Constitution, Congress may enact legislation governing the rules and practices of the Census Bureau in conducting the decennial census. Through 13 U.S.C. §§ 141 *et seq.*, Congress has delegated responsibility for conducting the census to the Secretary of Commerce. In turn, the Secretary of Commerce has delegated that responsibility to the Director of the Bureau of the Census.

3. To enumerate the population of the United States for Congressional apportionment, the Census Bureau establishes enumeration rules ("who" should be counted) and residence rules ("where" should they be counted) to deal with the various situations that will or may prevail at the time of the census. Attached as Exhibit A is a true copy of a Census Bureau memorandum that states the enumeration and residence rules to be used for the 1990 census.

4. Since the first census in 1790, the Census Bureau has used the concept of "usual residence" as the guiding principle in formulating enumeration and residence rules for the conduct of each census.

5. The "usual residence" concept, as applied by the Census Bureau, provides that persons should be included in the census counts at the place where they are living and

sleeping most of the time, as of the date that the census is taken.

6. In conducting the 1990 census and previous censuses, the Census Bureau provided instructions to respondents and census takers that described the concept of "usual residence," as well as other enumeration and residence rules, to determine who should or should not be included on the census questionnaire for particular living quarters.

7. While completing a questionnaire or answering questions from census takers, respondents, rather than the Census Bureau, determine their "usual residence." This information is used for purposes of congressional apportionment. Respondents also interpret the enumeration and residence rules supplied on the questionnaire or by the census taker in determining who they should report as being residents or a particular living quarters. Attached as Exhibit B are true copies of the instructions provided to respondents with the 1990 census questionnaire, and residence rules provided to census enumerators for the 1990 census.

8. In an August 15, 1983 intra-agency memorandum regarding residence rules issues for the 1990 Census, the Census Bureau defined "usual residence" operationally as where a person spends four nights a week, or more than 182 days in the calendar year. The instructions to the Official 1990 U.S. Census form define "usual residence" as the place where the person lives and sleeps most of the time. Under literal application of these definitions in 1990, the "usual residence" of military personnel stationed overseas is their overseas post.

9. During the 1990 census, the Census Bureau followed the procedure described above to count and apportion persons who were residing within the fifty states on the census date, including federal civilian and military

employees and their dependents. The Census Bureau did not determine the usual residence of U.S. military personnel and federal civilian employees and their dependents stationed overseas (hereinafter "overseas federal employees") using the enumeration and residence rules set forth in Exhibit A or the questionnaire set forth in Exhibit B. Instead, in 1990 the Bureau apportioned overseas federal employees to states following other procedures that are described below.

10. For the 1990 and prior censuses, with the exception listed below, the Bureau's enumeration and residence rules stated that Federal military personnel stationed in the United States and its territories were to be counted at the living quarters where they were usually living and sleeping at the time of the census. For example, persons stationed on military bases within the United States were counted at their living quarters whether on or off base. The same enumeration and residence rules stated that such military personnel should not be included in living quarters where they might be considered household members (such as a place they had lived before entering military service or where they intended to live after leaving military service), if they were living elsewhere while serving in the military. Except as described below this also was true of military personnel residing (usually living and sleeping) outside the United States at the time of the 1990 and prior censuses. For the 1900 census, the instructions to enumerators stated as follows: "If a soldier, sailor, or marine (officer or enlisted man), or civilian employee in the service of the United States at a station at home or abroad, is a member of a family living in your district, he should be enumerated as a member of that family, even though he may be absent on duty at the time of the enumeration."

11. With the exception of the instruction for the 1900 census set forth immediately above, the instructions set

forth in the preceding paragraph were not used to enumerate sailors. The 1990 instructions for sailors appear at pages 7-8 and 14-17 of Exhibit A to this Stipulation. That Exhibit also describes other instructions that have been used to enumerate sailors in prior censuses.

12. For the 1990 and prior censuses, except 1900, the Bureau's enumeration and residence rules stated that overseas federal employees, who might be considered a household member for a particular living quarters, but who were residing (usually living or sleeping) elsewhere at the time of the census, should not be included on the questionnaire for that living quarters. This included any employees residing outside the boundaries of the United States at the time of the census.

13. Overseas federal employees who, as of the census date, were living or stationed in areas which were outside the fifty states but within U.S. sovereignty, for example Puerto Rico, Guam, Virgin Islands and American Samoa, have in past censuses been enumerated in the areas they resided on the census data and not apportioned to any state. In 1900, such employees were enumerated outside the United States, and domestic enumerators also received the instruction set forth in paragraph 10. In 1990, such persons were enumerated and also allocated back to their "home" state for apportionment purposes.

14. During the time period between the ratification of the Constitution and the later ratification of the Fourteenth Amendment, the federal government did not change its definition or its application of the "usual residence rule" in the conduct of censuses.

15. In 1790 and subsequent censuses, enumerators counted indentured servants and slaves for apportionment purposes at the place where they were living as of the census date.

16. During the nineteenth and early twentieth centuries, significant numbers of American soldiers served at duty stations and military posts located outside of any state of the United States. The Department of War also employed civilians at such stations and posts. Some such soldiers and civilians had dependents who lived with them. Such stations and posts were located in the western territories of the United States, Alaska, Hawaii, the Canal Zone, and the Phillipines, as well as other locations.

17. During the nineteenth and twentieth centuries, the War Department maintained records of the states in which its soldiers and employees had lived before entering federal service or considered their permanent homes. Prior to the 1970 census, federal authorities did not use such records to apportion soldiers and employees to particular states.

18. In 1830 and 1840 and in every census since 1900, the Census Bureau has obtained administrative counts of at least a portion of the American population living overseas as of each census date. With the exceptions of 1970 and 1990, the Census Bureau has included such persons, including overseas federal employees, only as part of the total population of the United States, and has not included them in the population of any state, either for apportionment of congressional seats or for any other tabulation or use of census data.

19. For purposes of apportionment of soldiers to states, the United States government first promulgated a specific written rule in connection with the 1880 census. The rule was: "All soldiers of the U.S. Army, and civilian employees, and other residents at posts or on military reservations will be enumerated in the district in which they reside, equally with other elements of the population."

20. The Census Bureau has not adopted any formal regulation governing the apportionment of overseas federal employees or dependents to particular states.

21. For the 1950 through 1990 censuses, enumeration and residence rules instructed respondents and enumerators that students staying (usually living and sleeping there) at a particular living quarters (at the time of the census) while attending college were to be included on the questionnaire for that living quarters. The same rules instructed respondents and enumerators for living quarters where a student might be considered a household member (such as their family home) not to include them if they were living somewhere else while attending college.

22. For the 1900 through 1940 censuses, respondents and enumerators were instructed that students who were enrolled in colleges and living away from their families on the census date were to be included on the census questionnaire for their parent's residence rather than the census questionnaire for their college residence.

23. For the 1900 and subsequent censuses, respondents and enumerators were instructed that students in boarding schools and staying (usually living and sleeping there) away from their families on the census date were to be included on the census questionnaire for their parents' residence rather than the census questionnaire for their boarding school residence.

24. For the 1850 and subsequent censuses, the Census Bureau's enumeration and residence rules stated that persons residing (usually living and sleeping) in institutions such as a prison, a mental hospital, or a nursing home at the time of the census were not to be included on census questionnaires completed for addresses where they might be considered a household member, such as the place they had lived before commitment, or where they intended to live after their release from the institution. Instead, these

institutionalized persons were counted on census questionnaires at the institutions where they resided.

25. Congress has debated proposals which would have amended the Constitution to exclude illegal aliens from census apportionment counts. No such proposal has been approved by Congress or enacted into law.

26. The 1970 and 1990 censuses are the only times that the Census Bureau has included, as a separate group, counts of overseas Federal employees living in foreign countries on the census date in the population counts used for purposes of congressional apportionment.

27. In a letter of October 15, 1969 to the Deputy Assistant General Counsel of the Department of Commerce, then-Assistant Attorney General William H. Rehnquist concluded that "the Director of the Census may, in his discretion, validly adopt" a procedure to secure information as to the "home state" of military personnel, civilian employees of the government, and their dependents, and to allocate such persons to their respective home states for inclusion in the population counts used for apportionment. A true copy of that letter appears at pages 14-15 of the Administrative Record.

28. In 1970, during the Vietnam War, the Census Bureau included counts of overseas federal employees for the apportionment of congressional seats (but not for other tabulations or uses of census data). The State of Connecticut lost a seat, and the State of Oklahoma gained a seat, as a result of the inclusion of these persons. The number of congressional seats allocated to the Commonwealth of Massachusetts was not affected by this 1970 decision. Members of the Army, Air Force, and Marine Corps stationed overseas were apportioned based on their home of record. The dependents of the land based military, crews of Navy vessels assigned to the 6th and 7th fleets, and overseas Federal civilian employees and their

dependents were self-enumerated using the Overseas Census Report, a form requesting their "home state."

29. A July 1976 report by the federal Advisory Commission of Intergovernmental Relations showed that some military personnel selected as their "home state" one with low or no income taxes rather than their "true" home state. In Congressional testimony in September 1976 and in Census Bureau documents prior to the 1980 Census, officials from the Census Bureau stated that "data on the home state listed in the personnel records of American military personnel stationed overseas are of unknown reliability." Officials from the Census Bureau testified in September 1976 that for this reason, and because the number of Americans abroad had been cut in half, from 1.6 million in 1970 to 930,000 as of September 30, 1975, the Bureau had determined not to include overseas military in the apportionment population. See A.R. 49-65.

30. In the 1980 census, the Census Bureau did not include counts of any overseas federal employees for the apportionment of congressional seats.

31. Census Bureau began planning for the 1990 census in the Fall of 1983. As of October 15, 1987, the Census Bureau had decided not to include any of the overseas population in the census counts used for apportionment.

32. The document that appears on pages 213-36 of the Administrative Record is a Policy Paper dated April 7, 1987, prepared by the Director of the Bureau of the Census concerning Enumeration and Residence Rules for the 1990 Census. That Policy Paper states the official policy of the Census Bureau as of the date it was created.

33. During the 100th Congress, several bills were introduced that would have required the inclusion of overseas military personnel in censu counts for apportionment purposes. These bills included H.R. 3814, H.R. 4234, H.R. 3815, H.R. 4720, and S. 2103. See A.R. 367,

296-97, 284-85, 414-19, 291-92. Both H.R. 3814 and H.R. 4234 also would have required the exclusion of illegal aliens from census counts used for apportionment. The House Committee on Post Office and Civil Service which had oversight responsibility for the Census Bureau, passed H.R. 4720 on September 14, 1988. The full House considered H.R. 4720 on September 28, 1988, but a majority (317 to 93, with 21 not voting) voted not to suspend rules, and thus did not pass the bill. The 100th Congress did not enact any legislation addressing the question of whether or not overseas federal employees should be apportioned to states in the census, or how any such apportionment should be done.

34. In a June 8, 1988 letter to the Chairman of the Committee on Post Office and Civil Service, the General Counsel of the Department of Commerce stated that the Department opposed the enactment of H.R. 4720 (A.R. 414-19). A true copy of that letter which stated the official views of the Department on H.R. 4720, appears at pages 365-66 of the Administrative Record.

35. The letter attached as Exhbibit C is a true copy of a letter dated April 14, 1988 from the U.S. Department of Justice to James Miller, Director of the U.S. Office of Management and Budget.

36. In two August 11, 1988 letters concerning the enumeration of overseas personnel, the Census Bureau stated that "according to the usual residence concept, the 1990 census counts for apportionment will not include military personnel living outside the United States . . . on census day."

37. During the 101st Congress, the following bills were introduced that would have required the inclusion of overseas military in the counts used for congressional apportionment: H.R. 1468, H.R. 2661, H.R. 3016 and S. 290. See A.R. 474-79, 491-92, 506-09, 839-40, 459-60,

845-46. H.R. 1468 and H.R. 3016 would also have required the inclusion of overseas civilian employees of the United States in apportionment counts. Two of those bills, H.R. 1468 and H.R. 2661, also required exclusion of illegal aliens from the counts used for apportionment. In addition, the following bills were introduced requiring the exclusion of illegal aliens from the counts used for apportionment: H.C.R. 195, H.J.R. 199, H.R. 744, S. 848. See A.R. 775-76, 472-73, 461-63, 484-86. None of the bills listed above passed either the House or the Senate. The 101st Congress did not enact any legislation addressing the question of whether or not overseas federal employees should be apportioned to states in the census.

38. On July 31, 1989, while the 101st Congress was in session, Secretary of Commerce Robert Mosbacher decided to include counts of overseas Federal employees in the 1990 census count for purposes of congressional apportionment. A true and complete copy of a document showing the Secretary of Commerce's statement of reasons for the decision appears at pages 511-12 of the Administrative Record. On August 1, 1989, the Department of Commerce publicly announced this decision. A true copy of the press release issued by the Department at that time appears at page 735 of the Administrative Record.

39. At a September 7, 1989 congressional committee hearing on H.R. 2661, Census Bureau Deputy Director C.L. Kincannon announced that the Census Bureau would include counts of overseas Federal employees for apportionment purposes. A true copy of the September 7, 1989 Kincannon testimony appears at pages 758-74 of the Administrative Record.

40. A true copy of a letter sent in March 1990 from the Secretary of Commerce to the Secretary of Defense appears at 834 of the Administrative Record.

41. A true copy of a letter sent in May 1990 from the Director of the Census Bureau to Congressman William Ford appears at 832-3 of the Administrative Record.

42. As a result of the Census Bureau's decision to include overseas federal employees in census counts for purposes of congressional apportionment in the 1990 census, the Commonwealth of Massachusetts will lose one seat (relative to the previous apportionment in 1980 and to the number of seats it would have received if overseas federal employees had not been apportioned to states) in the House of Representatives. If overseas federal employees were excluded from apportionment counts, the State of Washington would lose one seat in the House, as compared to its apportionment if such employees were included.

43. In discussions with the Census Bureau and members of Congress concerning the 1990 census, the Department of Defense discouraged the use of "home of record" as the criterion for apportioning military personnel to specific states because: 1) its personnel records had a high rate of error with respect to "home of record;" 2) home of record may be a place where a person has not lived for many years and, in some cases, may be a place where the person has never lived; and 3) home of record information was missing for 7 to 10% of the active force and was entirely unavailable for civilian DOD personnel.

44. In Congressional testimony in 1989, DOD officials testified that "none of the data elements contained in DOD personnel records (i.e., home of record, tax residence, voting residence) meets a reasonable test of validity for apportionment purposes."

45. In 1989, prior to the Census Bureau's decision to include overseas federal employees in the apportionment population, the Department of Defense planned to do an actual enumeration of its overseas employees. DOD stated

to the Bureau that it intended to survey its military and civilian employees, either in person or by questionnaires, to determine which state, if any, they considered their permanent home. The DOD's stated intent to conduct an actual enumeration of its employees was a significant reason for the Secretary of Commerce's July 31, 1989 decision to change the Department's prior policy and to include DOD's overseas employees for apportionment purposes. A memorandum approved by the Secretary stated that he also based this decision on the "growing bipartisan Congressional support" for including the overseas military in the apportionment counts and on then-Assistant Attorney General Rehnquist's legal opinion on the issue.

46. In December 1989, DOD cancelled its plans to do an actual enumeration of its employees for the 1990 census apportionment due to a lack of funds.

47. Following the cancellation of its planned enumeration, DOD stated to the Census Bureau that it could provide data on the "last six months" of residence in the United States that were superior to its data on "home of record." For this reason, and because at that time the Census Bureau believed that the "last six months" data was more closely compatible with the concept of "usual residence," than the data elements contained in the DOD's personnel records, the Census Bureau determined as of March 29, 1990, that it would base the apportionment of overseas military employees in the 1990 census upon the "last six months" rule rather than home of record.

48. Between June 19, 1990, and July 10, 1990, DOD informed the Census Bureau that it did not have the ability to assemble data on the last U.S. address of six months' duration for its overseas employees.

49. On May 23, 1990, two bills were introduced in Congress concerning the method by which members of the overseas military would be apportioned to their "home

states." H.R. 4903 and S. 2675 both would have required the Census Bureau to apportion members to their home states using the member's "home of record." On June 26, 1990, the House passed H.R. 4903. The 101st Congress did not enact any legislation addressing the question of how such apportionment should be done.

50. On or about July 10, 1990, after DOD had informed the Census Bureau that it could not provide data on last U.S. address of six months' duration, the Census Bureau decided that it would apportion DOD's overseas employees to particular states based on their "home of record" as listed in DOD records.

51. After informing the Census Bureau that it could not provide data on its members' last U.S. residence of six months' duration, DOD identified three alternative means for determining the home state affiliation of its overseas military personnel: legal residence, home of record, and last duty station. A.R. 921. In a July 23, 1990 letter to Representative Thomas Sawyer, Michael Darby, Under Secretary for Economic Affairs, stated the Commerce Department's reasons for its decision to apportion overseas federal employees based on home of record. The letter that appears at A.R. 925 is a true copy of the July 23, 1990 Darby letter. See A.R. 925.

52. In an August 1, 1989 press release, the Census Bureau stated that the DOD estimated that it had 1.2 to 1.6 million overseas employees.

53. The actual number of overseas federal employees included in the 1990 census apportionment count was 922,819. 919,810 of these were apportioned to states; the remainder were apportioned to the District of Columbia. The number of overseas employees attributed to the DOD was 901,880.

54. In the February 29, 1991 Final Status Report on the Overseas Count Project, the Census Bureau stated

"that the DOD total count of 901,880 overseas personnel/dependents was less than estimated because: 1) the DOD estimated range was for a period when the levels of military deployments overseas were higher than on Census day, 2) the DOD estimated range included U.S. Navy personnel who, in accordance with the census rules of residence, were not considered to be overseas and were covered by census procedure that applied to the U.S. resident population, and 3) given the 20-percent response to the civilian survey, overseas civilians and dependents were missing from DOD's final submission of counts to the Census Bureau."

55. Of the 40 federal agencies that were invited to submit counts of overseas employees for apportionment purposes in the 1990 census, 30 actually submitted such counts. Of the 30 reporting, 20 included dependents and 10 did not. Four of the reporting agencies could not provide a home state for all of their overseas employees.

56. In the 1990 census, overseas military personnel and their dependents were assigned to states for purposes of apportionment based on home of record. If the Department of Defense ("DOD") did not have a home of record for a member of the military, the member's, and his or her dependent's, home state was determined on the basis of the member's legal residence (with last duty station being used if legal residence was not available). Pursuant to the above procedures, there remained 1,846 military personnel and dependents who were counted but were not apportioned to states because their home state could not be determined.

57. Because the DOD did not have home of record information available for its civilian employees for the 1990 Census, it sought to determine the home states of civilian employees stationed overseas through their responses to a questionnaire circulated by DOD. The DOD sent questionnaires to 61,205 of its overseas civilian employees. The DOD did not send questionnaires to dependents of its civilian employees; rather, those persons were intended to be assigned according to the employees' responses. The DOD received completed questionnaires from approximately twenty percent of all such civilian employees. Those employees who did not respond, and their dependents, were not assigned to any state for apportionment purposes. Employees who did respond were asked to identify a home of record, legal residence, and last duty station. As with military personnel records, home of record was used first, then legal residence, and finally last duty station. Other federal agencies were instructed to determine the home states of their employees, and their dependents, stationed overseas, based solely on their administrative records.

58. In conducting the 1990 census, the Census Bureau did not require or verify that federal overseas employees and their dependents were apportioned to the state in which they had elected to vote. Nor did the Census Bureau require or verify that individuals in the United States were apportioned to the state in which they had elected to vote.

APPORTIONMENT FORMULAS

59. The Census Bureau conducts the decennial census to determine the whole number of persons in each state, and then calculates the apportionment of seats in the U.S. House of Representatives among the states. The calculation of the apportionment is based upon the method of equal proportions, also known as the Hill-Huntington method (hereinafter the "Hill method"), as required by Title 2, United States Code, Sections 2a(a), 2b. These results then are conveyed to the President through the Secretary of Commerce. The President then transmits to

the United States Congress (the Congress) a statement of the whole number of persons in each state and the number of representatives in the Congress to which each state is entitled, as ascertained under the decennial census. The Clerk of the U.S. House of Representatives (the House) then notifies each state (via a Certificate of Entitlement) of the number of representatives in Congress to which it is entitled.

60. The Congress has legislated four methods for apportionment since the first census of 1790. In 1941, Congress codified in Title 2 of the United States Code laws that govern the method currently used and the process for apportionment. Article I, Section 2 of the Constitution requires that Congress apportion House seats according to population, but does not allow for fractional House seats nor districts which cross state lines. Congress must apply some method to round off each state's otherwise fractional number of seats.

61. In 1792 Congress legislated use of the Jefferson method (also known as the method of greatest divisors) of apportionment after the first census in 1790. This method was used after each subsequent census through 1830. Under this method, the population of each state was divided by a fixed ratio (a pre-specified number of persons per representative) and the resulting integer was the size of the state's delegation, regardless of the size of the fractional remainder. For example, if the ratio for a particular state was 3.4, the state would receive 3 representatives. If the ratio was 3.9, the state still would receive 3 representatives. This method did not require that the size of the House, i.e., the total number of representatives, be a fixed number (in fact, the method would have to be modified for use with a fixed House size). Instead, the size of the House was the sum of the number of representatives given to each state using the above method. The size of the

House grew over time based on apportionments following the 1790, 1800, 1810, 1820, and 1830 census.

62. Following the 1840 census, the Congress legislated use of the Webster method (also known as the method of major fractions (hereinafter "Webster method")) for the apportionment calculation. As then employed, with no mandate that the size of the House be fixed, it used a fixed ratio (of a pre-specified number of persons per representative), but an additional seat was assigned for each fractional remainder greater than one-half. For example, if the ratio for a state was 3.2, the state received 3 representatives. But if the ratio was 3.9 (or anything greater than 3.5, but less than 4.5), the state received 4 representatives. This method also did not require that the size of the House be a fixed number (and in fact would need to be modified for use with a fixed House size); the total number of representatives again was the sum of the representatives allocated to each state under this method.

63. Congress legislated use of the Vinton method (also known as the Hamilton method) for apportionment following the censuses of 1850 through 1900. It utilized a fixed number of representatives. In this method, the apportionment population of the United States was divided by the fixed size of the House to derive a national-average-size Congressional district. The population of each state was then divided by this national-average-size Congressional district to obtain an exact quota of representatives. (This is known as the "House seat quota"). One representative was assigned to each state whose exact quota was less than one (to meet the Constitutional requirement that each state receive at least one representative). The other states (having quotas greater than or equal to 1.0) were assigned a seat for each whole number of their respective quotas, and any remaining seats were assigned on the basis of the highest fractional remainders for those states.

Under this method, it is mathematically possible that a state could receive fewer seats if the size of the House were increased and the population of all states remained constant. This anomaly is known as the "Alabama paradox", because it was observed that for the 1880 census, Alabama would receive eight seats with a House size of 299 and seven seats with a House size of 300 by the use of the Vinton method.

64. In 1910, Congress legislated use of the Webster, or major fractions, method. Congress also fixed House membership at 433, with the proviso that "if the Territories of Arizona and New Mexico shall become States in the Union before the apportionment of Representatives under the next decennial census they shall have one Representative each. . . ." 37 Stat. 14 (1911). Both Arizona and New Mexico became states in 1912 and House membership has been 435 since that time, except when it was increased temporarily when Alaska and Hawaii became states in 1959.

65. Congress could not decide on an apportionment plan following the 1920 census, but in 1929 passed a law that made reapportionment automatic, using whatever method was used for the previous apportionment in the event the Congress did not agree on another method.

66. Using results of the 1930 census, both the Hill method and the Webster method produced the same apportionment. The Congress did not legislate any method of apportionment, so as a result of the 1929 legislation, the apportionment for 1930 was automatic and was based upon the Webster method (because it had been used for the previous (1910) apportionment).

67. In January 1941, the President transmitted to Congress apportionments based upon both the Hill method and the Webster method. The methods produced the same apportionment except for two states, Arkansas

and Michigan. The Hill method resulted in an additional seat for Arkansas; the Webster method resulted in an additional seat for Michigan. Congress debated the apportionment methodologies and enacted legislation adopting the Hill method, by a vote in which every Democrat (except those from Michigan) voted for, and every Republican voted against, the bill. No legislation affecting the method of apportionment has been passed by Congress since 1941. As a result, the Hill method has been used for each subsequent apportionment, including 1990.

68. One of the products of the lengthy debates in the Congress regarding apportionment following the 1920 census, was the Congress' commissioning the National Academy of Sciences (NAS) to prepare a report "regarding the mathematical aspects of the problem of reapportionment". The report of the Committee on Apportionment discussed five methods "now known which are unambiguous (that is, lead to a workable solution)": smallest divisors (Adams method), harmonic means (Dean method), equal proportions (Hill method), major fractions (Webster method), and greatest divisors (Jefferson method). With a fixed House size, apportionments under these five methods are calculated using formulas involving each state's apportionment population and a divisor which determines each state's priority for its next seat (after one seat is assigned to each state). The divisors for the different formulas are functions of the number of seats already assigned to a given state which vary according to specific goals that each method is designed to achieve.

69. The report of the National Academy of Sciences committee, submitted to Congress in 1929, stated that the committee preferred the Hill method. The report analyzed five methods: Adams, Dean, Hill, Webster and Jefferson. It listed them in the order in which they "favor the larger States as compared with the methods which precede it"

(the Adams method favoring the small states the most, Jefferson's favoring the large states the most, and the Hill method listed third among the five); and stated that Hill's method "occupies mathematically a neutral position with respect to emphasis on larger and smaller states". (Report of the National Academy of Sciences Committee On Apportionment from the Annual Report of the National Academy of Sciences, Fiscal Year 1928-29, pp. 20-23).

70. In 1948, Congress asked the National Academy of Sciences to re-examine the various apportionment methods. An NAS committee concurred with the conclusion of the 1929 report.

71. Following both the 1970 and 1980 decennial censuses, Congress conducted hearings regarding methods of Congressional apportionment.

72. The apportionment method used in 1990, pursuant to Congressional legislation in force since 1941, was the Hill method. Using this method, Massachusetts received 10 seats under the apportionment based on the 1990 census.

73. If the Webster method for apportionment based on the 1990 census had been used (either excluding or including the counts of overseas military, other Federal employees, and dependents), Massachusetts would have received 11 seats. The Webster method may be applied as follows: a) A divisor would be found by dividing the apportionment population by 435 (the total number of seats) to produce the national average size district. b) Each state's apportionment population would then be divided by the above divisor to obtain a quotient consisting of a whole number (possibly zero) and a fraction. c) If a state's quotient was less than 1.0, it would be rounded up to 1.0 no matter how small the fraction. d) For all other states (those with a quotient greater than or equal to 1.0), fractions less than one-half (0.5) would be rounded down, and

fractions greater than one-half (0.5) would be rounded up. e) If the whole numbers resulting from this process summed to 435, the apportionment would be determined and no alteration of the divisor would be needed. f) If too many seats, or too few seats, were allocated by this process, the divisor would be made larger or smaller, respectively, until the total number of whole numbers achieved after rounding was equal to 435.

74. Under the Hill method, 1) each state first receives one Representative, as required under the Constitution. 2) A series of priority values is calculated for each state from which can be determined the state's entitlement to a second Representative, a third, and so on. 3) When the priority values are arranged in sequence (from highest to lowest), they indicate which state should get the 51st Representative, which the 52nd, etc. up through the 435th Representative. 4) The priority values are determined by multiplying the apportionment population of each state by the reciprocal of the geometric mean of the number of seats already assigned, a, and the next integer, $a+1$, i.e., 1 divided by the square root of the quantity $a(a+1)$. Alternatively, the apportionment under the Hill method could be obtained as described in paragraph 73 for the Webster method, with one-half (0.5) replaced by the following quantity: the square root $a(a+1)$, minus a, where a is the largest integer not exceeding the state's quotient. For example, if the quotient is 2.7, then the square root of (2×3) minus 2 is approximately 0.449.

75. For quotients greater than one, the Hill rounding point is less than .50. The larger the whole number in a state's quotient, the larger is the Hill rounding point. For example, if a state's quotient falls between 1 and 2, then its Hill rounding point is the square root of 1×2, minus 1, which is approximately .414. If a state's quotient falls

between 20 and 21, then its Hill rounding point is the square root of 20 × 21, minus 20, which is approximately .494.

76. For quotients greater than one, the Webster rounding point is always .50 exactly.

77. The rounding points in the previous two paragraphs are not always indicative of how the Webster and Hill methods would round the exact quota of a state. For the 1990 census, New York, New Jersey, Massachusetts, and Oklahoma have exact quotas of 31.521, 13.536, 10.532 and 5.516, respectively. The fractional portion of the quota for each of these four states is above the rounding points for both the Webster and the Hill methods. Yet, the Webster method rounds down the exact quota for each of these states except Massachusetts and the Hill method rounds down the exact quota for each of these states except Oklahoma. Other examples exist in previous censuses where the exact quota is below the rounding point for both Webster and Hill and where either the Hill or Webster methods, or both, round up the exact quota.

78. If the Webster and Hill methods yield different apportionments, then the Hill method, as compared with the Webster method, awards fewer seats to the state or states with larger populations and more seats to the state or states with smaller populations. For example, in 1990, Webster's method gives one more seat to Massachusetts, which has a larger population, rather than to Oklahoma, which is given the extra seat under the Hill method.

79. Exhibit D displays the number of seats which would have been apportioned to Massachusetts based on the 1990 census under seven different apportionment methods. The number of seats that Massachusetts would receive varies depending on the method used and whether the overseas military, Federal employees, and dependents

are included (Apportionment Population) or excluded (Resident Population).

80. By dividing the apportionment population by the total number of seats in the House of Representatives (435), a national-average-size congressional district can be obtained.

81. When the national-average-size congressional district is divided into the apportionment population of a state, the mathematical result is that there is (except for the three smallest states) a whole number of congressional seats plus a fraction of a seat, known as the "House seat quota."

82. All methods of apportionment result in House seat quotas which contain fractions which must be rounded to whole numbers. Any rounding of a House seat quota results in some states receiving more seats than their House seat quota and some states receiving less seats than their House seat quota.

83. Exhibit E displays Massachusetts' House seat quota and the number of seats which would have been apportioned to it under the Hill and Webster methods from 1940-1990.

84. According to 1990 decennial census, Massachusetts was the thirteenth most populous state.

85. Massachusetts has been among the thirteen most populous states according to every decennial census since 1940.

86. In every one of the six apportionments from 1940-1990, the total number of seats allotted to the thirteen most populous states by the Hill method was less than the sum of their House seat quotas. In five out the six apportionments from 1940-1990, the total number of seats allotted to the thirteen most populous states by the Webster method was less than the sum of their House seat quotas.

87. Under the 1990 Census, Massachusetts will receive twelve electoral votes under the Hill method. Under the Webster method it would receive thirteen electoral votes.

DATED this 1st day of November , 1991.

/s/ DWIGHT GOLANN
Dwight Golann
William P. Lee
Steve Berenson
Assistant Attorneys General
One Ashburton Place, Rm. 2019
Boston, MA 02108-1698
(617) 727-2200

/s/ MARK H. MURPHY
Sandra Schraibman
Mark H. Murphy
Attorney, Dept. of Justice
Civil Division, Room 3708
10th & Pa. Ave., N.W.
Washington, D.C. 20530
(202) 514-5124

Counsel for Executive Branch Defendants

/s/ JOHN P. DRISCOLL, JR.
/s/ EDWARD P. LEIBENSPERGER
/s/ NEIL P. MOTENKO
John P. Driscoll, Jr.
Edward P. Keibensperger
Neil P. Motenko
Special Assistant Attorneys General
Nutter, McClennen & Fish
One International Place
Boston, MA 02110-2669
(617) 439-2000
Counsel for Plaintiffs

5348e

EXHIBIT A

[SEAL]
UNITED STATES DEPARTMENT OF COMMERCE
BUREAU OF THE CENSUS
Washington, D.C. 20233

OFFICE OF THE DIRECTOR

[OCT 15, 1987]

1990 DECENNIAL CENSUS
POLICY MEMORANDUM NO. 12

MEMORANDUM FOR: Distribution List

From: Charles D. Jones [CJ]
Associate Director for Decennial Census

Subject: Enumeration and Residence Rules for the 1990 Census

The attached policy paper defines the enumeration and residence rules for the 1990 Decennial Census of Population and Housing (Attachment 1). These rules address the fundamental issues of whom we will enumerate in the 1990 census and where we will enumerate them.

In preparing this policy paper, the Census Bureau re-examined the constitutional, legal, and historical basis for the enumeration and residence rules established for the first decennial census of 1790 and used with minor modifications for all subsequent decennial censuses. In developing this policy paper for 1990, the Census Bureau considered carefully the operational as well as the legal implications of the traditional rules. In December of 1986, the Census Bureau also contracted for a conference of experts—demographers, statisticians, data users, and analysts from both the public and private sectors—and

solicited their advice and recommendations for the appropriate enumeration and residence rules for the 1990 census. The attachment also contains the recommendations, some of which the Census Bureau incorporated in the policy paper, from that conference (Attachment 2).

The Census Bureau will incorporate these enumeration and residence rules in the design of forms, procedures, and instructions for the 1990 census.

Attachments

Attachment 1

ENUMERATION AND RESIDENCE RULES FOR THE 1990 CENSUS EXECUTIVE SUMMARY

The *enumeration* and *residence* rules for the 1990 census provide the basis for determining *who* to count in the 1990 census and *where* to count them.

The application of enumeration and residence rules must support the goal of obtaining the most accurate counts possible for all geographic areas. To determine these rules, the Census Bureau examined past practices in light of questions about legal residence within the United States as a criterion for enumerating a person, whether to count a person where found or contacted on Census Day or at another location based on established criteria, and the application of these rules to specific population subgroups. The Census Bureau also sought advice from experts outside the Census Bureau as part of this examination of past practices. The results of this examination are the enumeration and residence rules described in this document.

The first census of 1790 established enumeration and residence rules. From the outset, *enumeration rules* were based on constitutional and statutory requirements. The constitutional basis for the first census required the enumeration of all residents of the United States, not just citizens. The Census Bureau has followed this principle in all subsequent censuses and will follow it for the 1990 census.

Residence rules also were based on statutory requirements. The Census Act of 1790 covering the first decennial census established the concept of usual residence as the guiding principle for determining where to count a person. The usual residence concept requires the Census Bureau to

count a person where he or she lives and sleeps most of the time or where he or she considers the usual residence. The Census Bureau has followed this concept, with minor exceptions, in all subsequent censuses and we are adopting it again for the 1990 census.

In selecting the enumeration and residence rules for the 1990 census, the Census Bureau has identified certain groups for whom questions have been raised concerning the application of these rules. These groups and the related enumeration and residence decisions reached for 1990 are as follows:

Enumeration Rules

- The Census Bureau will count American citizens living in the United States on Census Day.
- The Census Bureau will count military personnel and their dependents living overseas by using administrative records but will not include them in the apportionment counts or any other tabulations for states.
- The Census Bureau will count Federal employees and their dependents living overseas by using administrative records but will not include them in the apportionment counts for any other tabulations for states.
- The Census Bureau will not count other American citizens residing overseas who are not members of the Armed Forces or Federal employees, and their dependents. However, the Census Bureau will investigate the feasibility of using administrative records to obtain counts of Americans residing overseas who are employed by multi-national corporations.

- The Census Bureau will count aliens, whether documented or undocumented, residing in the United States on Census Day.
- The Census Bureau will not count foreign diplomats residing on the premises of an embassy or legation on Census Day; the Census Bureau will count those not residing on the premises of an embassy or legation on Census Day.

Residence Rules

- The Census Bureau will count persons away from their usual residence on Census Day at their usual residence.
- The Census Bureau will count persons with multiple residences at the residence that they consider to be their usual residence.
- The Census Bureau will count persons with no usual residence, such as the homeless, where they are found living or staying on or near Census Day.
- The Census Bureau will count persons living away from the parental home at a college or university at their college or university residence.
- The Census Bureau will enumerate persons living away from the parental home at a boarding school as residents of their parental home rather than as residents of their boarding school.
- The Census Bureau will count crews of American-flag maritime vessels at their usual residence, whether on board ship or on shore.
- The Census Bureau will count land-based members of the Armed Forces residing in the United States at their usual residence, whether it is on base or off base.

- The Census Bureau will count crews of military ships not deployed to the U.S. Navy's 6th Fleet (Atlantic) or 7th Fleet (Pacific) and crews of U.S. Coast Guard vessels at their usual residence, whether it is on board ship or on shore. The Census Bureau will treat crews of U.S. Naval ships deployed to the 6th or 7th Fleet as part of the overseas population.
- The Census Bureau will count persons who move on or near Census Day at the place they consider to be their usual residence on Census Day (April 1, 1990).
- The Census Bureau will count migrant workers either at the camp where the Census Bureau contacts them or at their usual residence if they report one.
- The Census Bureau will count persons residing in a long-term care or custody facility as residents of the their institution. The Census Bureau will count persons in a short-term care or custody facility at their usual residence.

ENUMERATION AND RESIDENCE RULES FOR THE 1990 CENSUS

I. *INTRODUCTION*

The decennial census of the United States is one of the few Federal programs specifically mandated by the Constitution. Article I, Section 2, clause 3 states:

> Representatives . . . shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three-fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct.

(Passage of the Fourteenth Amendment to the Constitution in 1868, following the abolition of slavery, modified Article I, Section 2, clause 3.) This mandate, which the Census Bureau has now fulfilled 20 times, calls for an enumeration of the Nation's inhabitants for apportioning the seats in the House of Representatives.

An ideal census includes every person. Historically, this ideal has not been achievable.[1] As far back as the first census of 1790, President Washington recognized the limitations of a complete count as an achievable goal:

> . . . one thing is certain, our *real* numbers will exceed, greatly, the official returns of them; because the religious scruples of some would not allow them to give in their lists; the fears of others that it was intended as the foundation of a tax induced them to conceal or diminish theirs, and thro' the indolence of

the people, and the negligence of many of the officers, numbers are omitted.[2]

Although no U.S. census has ever achieved a complete or perfect count, the Census Bureau must develop procedures and strategies for the 1990 census that ensure the most accurate counts possible for all geographic areas. The purpose of this paper is to discuss the enumeration and residence rules that the Census Bureau will use to count the population in 1990. Specifically, it will present the decisions for determining who to count and where to count them in the 1990 census.

II. *THE GOAL OF THE 1990 CENSUS*

The practical goal of the 1990 census is to determine, as of April 1, 1990, the number of people residing in each geographic area of the United States, Puerto Rico, and the outlying areas. As with any goal, one must select strategies that provide the best opportunity for accomplishment. The Census Bureau has examined the various enumeration and residence rules and has identified those that offer the best opportunity to achieve the goal of the 1990 census. Within legal constraints, the Census Bureau has considered carefully the technical, operational and, in some cases, historical criteria in defining the universe of interest and determining how to count that universe. Section III of this paper presents the historical guidance for defining the universe of interest and defines several mutually exclusive subsets of the population. Section IV documents the Census Bureau's plans for counting these subsets of the population in 1990.

III. *DEFINING THE UNIVERSE OF INTEREST*

Over the years, the specified universe of interest for the census has changed. In the 1790 census, there were exclu-

sions defined by the Constitution and statutory law. For example, the Constitution excluded "Indians not taxed" from the first 15 decennial censuses. The ninth decennial census of 1870 did provide for the enumeration of Indians who were not part of the established tribes and thus were taxed. The 1940 and subsequent censuses included Indians following the U.S. Supreme Court ruling in 1936 that subjected *all* Indians to Federal taxation.[2]

According to the Constitution, the apportionment counts of the early census excluded two-fifths of "all other persons" (that is, slaves). The provision to include only three-fifths of all slaves in the apportionment count remained until the census of 1870 following passage of the Fourteenth Amendment to the Constitution in 1868. Section 2 of the Fourteenth Amendment states:

> Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.

Thus, except for these two groups, the Census Bureau has attempted to count all persons in each state for apportionment purposes. To achieve that goal, however, we must refine this seemingly simple rule by legal as well as operational considerations.

The planners of the first decennial census in 1790 provided a precedent that in general we have adopted for all subsequent decennial censuses in this country. In deciding where to count a person, we adopted the concept of usual residence to address the constitutional requirements. Simply stated, the concept of usual residence requires counting a person where he or she lives and sleeps most of the time or where he or she considers the usual residence. One should not overlook the importance of this concept as a cornerstone of the Nation's 20 censuses. It has provided

a practical and workable solution to the problem of where to count persons. With few exceptions, it is the residence concept that the Census Bureau again is adopting for the bicentennial census of 1990.

In deciding who to count and where to count them, it is useful to list, within the legal parameters, the possibilities or universe of interest. We can divide the possibilities into three major categories: resident citizens, nonresident citizens, and resident noncitizens. The list that follows defines the *possible* groups to include in the decennial census count for apportionment purposes.

RESIDENT CITIZENS

Resident citizens include all persons who are U.S. citizens, either by birth or by naturalization, whose usual residence is within one of the 50 states. Although some resident citizens live in the District of Columbia, Puerto Rico, or certain of the outlying areas (Guam, the U.S. Virgin Islands, and the Northern Mariana Islands), we do not include them in the apportionment count.

NONRESIDENT CITIZENS

This category includes persons who are citizens of the United States but whose usual residence on Census Day is not within the 50 states.

RESIDENT NONCITIZENS

This category includes persons whose usual residence on Census Day is in the 50 states, but who are not citizens of the United States. This group includes aliens, whether documented or undocumented, and foreign diplomats.

The above groups define whom we should or should not include in the decennial count. Questions on where to

count persons within these groups are applicable to the following subgroups:

- The noninstitutionalized civilian population, which includes, for example:
  - Persons temporarily away from their usual residence on Census Day.
  - Persons with no permanent residence on Census Day.
  - Persons away from the parental home and living at college on Census Day.
  - Persons away from the parental home and living at boarding school (elementary or secondary) on Census Day.
  - Persons with multiple residences on Census Day.
  - Crews of U.S. merchant vessels.
  - Persons moving between usual residences on Census Day.
  - Persons residing in migrant labor camps on Census Day.
- The institutionalized civilian population, which includes, for example:
  - Persons in correctional institutions on Census Day.
  - Persons in long-term health care institutions on Census Day.
- The military population, which includes, for example:
  - Land-based military personnel.
  - Crews of U.S. military vessels (including the U.S. Coast Guard).

IV. *ENUMERATION AND RESIDENCE RULES FOR 1990*

A. *CONCEPTUAL BASIS FOR ENUMERATION AND RESIDENCE RULES*

The Census Bureau establishes enumeration rules in response to the question of whom to include in the decennial census count. In establishing the enumeration rules, the Census Bureau relies on constitutional considerations, any relevant statutory requirements, and operational factors. Traditionally, the Census Bureau has understood the Constitution to mean that it must count persons (as opposed to citizens, property owners, or adults) who are inhabitants of the United States as of Census Day.

As the enumeration rules address "who to count" the residence rules address "where to count" a person, that is, where to assign a person geographically in the census files. In addressing this question, the Census Bureau must decide whether to count the person where found or contacted on Census Day or whether to count the person at another location based on established criteria.

Both legal and operational issues influence the decision on which residency option to use. The Census Act of 1790 stated:

> That every person whose usual place of abode shall be in any family on the aforesaid first Monday in August next, shall be returned as of such family. . . . Every person occasionally absent at the time of the enumeration . . . belongs to that place in which he usually resides.

The drafters of the Census Act of 1790 implemented the constitutional mandate by developing the concept of usual residence as the criterion for determining where to count a person. All subsequent censuses have used this concept to determine where to count a person.

Carefully designed and executed procedures based on the usual residence concept afford the best opportunity to achieve the goal of obtaining accurate counts for all geographic areas in 1990. The adoption of usual residence as the main residency rule for 1990 does not mean that the Census Bureau will not modify that rule. Such has been the case for our most recent censuses—we used physical location as the criterion for where to count the homeless, used "home of record" as the criterion for where to count the overseas military population in 1970, and included boarding school students (elementary and secondary) in the count at their parental home rather than at their school residence.

Along with the questions of whom to count and where to count them, the enumeration and residence concepts also encompass temporal considerations. We have traditional taken censuses as of a specific date, the idea being to capture an image of the population as of that specific date. The Census Act of 1790 established the first Monday in August 1790 as the census reference date, even though the U.S. marshals and their assistants did not complete the enumeration until 18 months later.[3] The actual reference date of the census has changed frequently over the psat 200 years in response to operational considerations. The reference date used in most censuses during the 19th century was June 1. January 1 was the scheduled date for the census of 1920 to accommodate an agriculture census taken at the same time.[4] The Census Bureau first established the date of April 1 for the 1930 census and it has used that date up to the present time. Title 13, United States Code mandates the specific date for the 1990 census—April 1, 1990.

While April 1, 1990 is the reference date for the census, the complexity and time frame of the census-taking operations are such that the Census Bureau will not contact

everyone on that date. The anticipated exceptions are noted in sections IVB and IVC below.

B. *ENUMERATION RULES*

1. *RESIDENT CITIZENS*

Resident citizens are part of the persons in Article I, Section 2 of the Fourteenth Amendment. The apportionment count will include those living in the 50 states.

2. *NONRESIDENT CITIZENS*

The overseas population includes Armed Forces members, Federal civilian employees, the dependents of these groups as well as other American citizens living abroad on Census Day. Before the 1950 census, U.S. Attorney General J. Howard McGrath, in an opinion dated August 26, 1949, said that the Congress had vested the Director of the Census Bureau with the discretion to determine procedural issues, including the enumeration of Americans abroad. Assistant Attorney General William H. Rehnquist reaffirmed McGrath's opinion in 1969.[5]

Thus, the decision on whether to count this population subgroup is discretionary. It rests on operational feasibility and efficiency with respect to obtaining accurate counts, and, to a certain extent, on data user needs. Since 1900, the Census Bureau has obtained administrative counts of at least a portion of this population subgroup. In 1970, as a result of the unusually large number of Americans (both military and civilian) involved in Vietnam, the Census Bureau counted military and Federal civilian employees and their dependents overseas and included them in the apportionment totals.[5] The procedure followed in

1970 was not based on a change in the Census Bureau's traditional understanding of the Constitution or other laws governing the apportionment process, but rather it was an effort to comply with the spirit of the law due to the large numbers of persons overseas. The Census Bureau has not included counts of other Americans living abroad in any census apportionment totals.

In 1980, the Census Bureau obtained administrative counts of military and Federal civilian employees and their dependents overseas. Since the unusual circumstances of war time did not exist in 1980, the official census tabulations for states did not include these counts. Finally, the Census Bureau did not attempt to obtain counts of other Americans overseas in 1980.

The specific categories of Americans overseas and the Census Bureau's enumeration rules for them in 1990 follow.

MILITARY PERSONNEL AND THEIR DEPENDENTS LIVING OVERSEAS

This category includes members of the Armed Forces and their dependents stationed overseas. It also includes crews of military ships deployed to the Navy's 6th (Atlantic) or 7th (Pacific) Fleet.

The Department of the Defense frequently updates and verifies administrative record counts of the overseas military personnel and their dependents.[6] Since the Census Bureau can obtain counts of persons in this category efficiently from Department of Defense administrative records, we plan to obtain the counts in 1990 and include them in the U.S. Summary

Report on Number of Inhabitants.* We will not include the counts in the official totals for the states since the assignment to geography would be arbitary and operationally difficult.

FEDERAL CIVILIAN EMPLOYEES AND THEIR DEPENDENTS LIVING OVERSEAS

Since the Census Bureau can obtain counts of persons in this category from administrative records provided by the Office of Personnel Management, we plan to publish counts of this population subgroup in 1990. We will not include these counts in the official totals for the states since the assignment to geography would be arbitrary and operationally difficult.

OTHER AMERICANS LIVING OVERSEAS

In the 1960 and the 1970 censuses the Census Bureau made attempts to obtain counts of Americans overseas who were not affiliated with the Federal Government. These attempts were not successful. For example, in 1970 we counted 680,000 civilians overseas, but data from foreign censuses show there were at least 1.2 million U.S. citizens overseas in 1970.[6] The decision on whether or not the Census Bureau should count this population subgroup is dependent on operational issues regarding accuracy and efficiency. Assuming that the Census Bureau could develop an operational definition, we would still face many

* The Department of Defense is presently negotiating with the Census Bureau for a direct enumeration of military personnel and their dependents living overseas. The plan would provide for counts based on an actual enumeration, rather than administrative records. The Census Bureau would not include the counts in the apportionment or other official totals for any state.

problems trying to obtain an accurate count. We do not know any administrative records that the Census Bureau could use to obtain a count of this population subgroup, thus, we would have to use direct enumeration. Voluntary outreach and publicity efforts by U.S. embassies and legations together with religious organizations, businesses, and colleges during the 1970 census were only marginally successful.[6] It is unlikely that the Census Bureau can direct effective and efficient outreach efforts toward this group in 1990. Given the many operational problems associated with obtaining an accurate count, the Census Bureau does not plan to count Americans living overseas who are not employees of the U.S. government.

The Census Bureau does plan to investigate the feasibility of obtaining administrative record counts of Americans overseas who are employees of the United States or multi-national corporations.

3. *RESIDENT NONCITIZENS*

The Census Bureau's traditional understanding of the Constitution and statutory law concerning the census is that it must attempt to count all residents, regardless of legal status. Throughout the past 20 censuses we have followed this traditional understanding of the Constitution. The following discussion details the Census Bureau's plans for counting persons in 1990 who are citizens of foreign countries.

RESIDENT ALIENS

This category includes citizens of foreign countries who are living in the United States on visas such as work or student visas. It also includes undocumented aliens who entered the country illegally and those who

entered the country legally but violated the terms of their visas. The Census Bureau has always attempted to count all persons whose usual residence on Census Day is in the United States, without regard to their legal status or citizenship, except for foreign travelers and residents of diplomatic missions.

For purposes of apportionment of the House of Representatives, the Census Bureau understands that the Constitution requires it to attempt to count all persons in each state without regard to their citizenship or legal status. The Federation for American Immigration Reform (FAIR) and several Members of Conress challenged this procedure before the 1980 census. In their suit against the Census Bureau, the plaintiffs charged that the count should not include illegal aliens for apportionment purposes. The government attorneys' legal argument centered on the wording in the Constitution, which specifies *persons* as the basis for apportionment, without distinguishing among the inhabitants other than Indians not taxed and slaves. Although the Court decided the lawsuit on procedural grounds (lack of standing), it did observe that illegal aliens "are clearly persons."[7]

Based on the traditional understanding of the Constitution, the Census Bureau will attempt to count all persons, including documented and undocumented aliens, residing in the United States on April 1, 1990. We will not count undocumented aliens who have not established a residence in the United States.

FOREIGN DIPLOMATS

Foreign diplomats include citizens of foreign countries attached to an embassy, consulate, legation, or chancellery of a foreign country or employed by an

international agency or mission such as the United Nations, the World Bank, or the International Monetary Fund. Beginning with the 1940 census, the Census Bureau has not counted such persons residing within the compound of an embassy or legation, since the diplomatic missions where they reside are actually foreign territory. The Census Bureau has counted in recent censuses employees of foreign embassies who *do not* live at the embassy.[8]

For the 1990 census, the Census Bureau does not plan to count citizens of a foreign country living on the premises of an embassy or legation because such persons are not residents of the United States. We will count foreign diplomatic personnel not living on the premises of an embassy or legation. The rationale for counting such persons is that they are residents of the United States.

C. *RESIDENCE RULES*

The Census Bureau will use the usual residence concept as the primary rule in determining where to include residents in the count. While the goal of the 1990 census is to count residents at their usual residence as of April 1, 1990, there are situations in which we must make special provisions to ensure that we meet this part of the goal. For the 1990 census, the Census Bureau must develop residence rules for persons whose usual residence is not the place where they are on Census Day or whose usual residence is ambiguous. The Census Bureau's plans for addressing these groups in 1990 follow.

1. *PERSONS AWAY FROM THEIR USUAL RESIDENCE ON CENSUS DAY*

The Census Act of 1790 provided for the counting at the usual residence of persons temporarily absent

from it at the time of the census. This practice has continued for all subsequent censuses and we will repeat it in the 1990 census.

Persons who report that their usual residence is different from the place where the Census Bureau contacts them include those traveling, living temporarily in hotels and motels, or maintaining a usual home elsewhere. The Census Bureau contacts such persons where they are physically staying on Census Day but asks them to provide the address of their usual residence. We then locate the questionnaire for the reported usual residence and add the person to that questionnaire if no one has reported him or her as a member of that residence already.

There are persons, though, who will not report the address of their usual residence or who will report an address that the Census Bureau can not identify on the census address file. We refer to such an address as an unidentifiable usual residence.[9]

The Census Bureau has examined several options for counting persons with unidentifiable usual residences. We have considered carefully how well each option contributes to the goal of obtaining accurate counts for all geographic areas. Some options examined would involve counting such persons at the place where we contact them, a procedure that might lead to an overcount to the extent that a household respondent or neighbor reports the persons at the usual residence. The other option would involve not counting them at the place where we contact them, the assumption being that a household respondent or neighbor would report such persons at the usual residence. If a household respondent or neighbor does not report these persons as household members at the

usual residence, adoption of this option could lead to an undercount.

In weighing these options against the goal of the census, the Census Bureau has determined that the option most in line with the enumeration and residence concepts is to assume that a household respondent or neighbor will report these persons at the usual residence. Accordingly, we have designed the 1990 enumeration and closeout procedures to count such persons at their usual residence. The Census Bureau believes that the extent of any undercount in a particular geographic area as a result of using this procedure would be substantially less than any concentrated overcount resulting from the adoption of the alternative procedure.

2. *PERSONS WITH MULTIPLE RESIDENCES*

Examples of persons with multiple residences include those who live for substantial periods at a residence other than their primary residence, children who spend time at each parental home, working couples in which the husband and wife maintain residences in separate cities, and Members of Congress who maintain residences in their home states as well as in the Washington D.C. area. The recent uptrend in some of these and other similar situations challenges the usual residence concept to the extent that the usual residence of persons with multiple residences is ambiguous or unclear.

There are two options available to the Census Bureau for counting persons with multiple residences. The Census Bureau can allow such persons to choose one residence as the primary residence or we can assign usual residence on the basis of objective criteria.

As in past censuses, for 1990 the Census Bureau plans to provide respondent instructions on the census questionnaire that will allow persons with multiple residences to identify one residence as their usual residence. We will count these persons at that residence. Similarly, the Census Bureau plans to count Members of Congress either at their Washington, D.C. area address or at their home state address, dependent upon which one they consider to be their usual residence.

3. *PERSONS WITH NO PERMANENT RESIDENCE*

Persons without a permanent residence include those living temporarily in housing units with friends or relatives, those living in transient quarters (motels, missions, shelters, and so forth) who do not claim a usual home elsewhere, and the homeless ("street people"). Since 1790, the Census Bureau has counted such persons as residents of the area where contacted. For 1990, the Census Bureau again plans to count all persons without a permanent residence in the area where we contact them.[9]

To obtain an accurate count of persons without a usual residence, the Census Bureau plans to conduct a special enumeration of persons living in shelters for the homeless and of "street people." This special enumeration will include a pre-Census Day identification of shelters, public parks, city blocks, and so forth, where the homeless congregate. The Census Bureau plans to ask local officials and local organizations that work with the homeless for assistance in identifying these places. Finally, we will use teams of interviewers to visit these places during a special "S-Night" to count persons found living or staying there.

4. *PERSONS AWAY AT COLLEGE*

Since the 1950 census, the Census Bureau has counted college students where they are living while attending college; before 1950, we counted students at the parental home. The Census Bureau changed the policy in 1950 because we had evidence that we were not counting some college students at all. In addition, applying the usual residence rule to college students required that we count them at the college. Following the 1970 census, the Borough of Bethel Park Pennsylvania challenged the Census Bureau's policy of counting college students at the college. The U.S. District Court that heard the suit ruled that the Census Bureau's policy for counting college students was "reasonable" since such students eat, sleep, and work for most of the year in the area of the college.[10]

In deciding where to count college students in 1990, the Census Bureau has considered the available options in light of the goal of the census. College students, particularly those living in dormitories, have a chance of being reported and counted at the parental residence. If we do not identify these cases, this could result in an overcount. On the other hand, to count college students at their parental home would be an unnecessary departure from the usual residence rule. In addition, some college students living in college dormitories no longer live with their parents at any time, and, hence, we can only count them at their college residence. Not counting such students at college could lead to an undercount. Finally, the practice of the Census Bureau in recent censuses of counting college students at their college residences has been upheld by a U.S. District Court.

Adherence to the usual residence concept requires that the Census Bureau continue to count college students at their residence at school in 1990.

5. *PERSONS AWAY AT BOARDING SCHOOL*

The Census Bureau traditionally counts boarding school students below the college level at their parental home. This procedure has continued in recent censuses because of the age of the students and their dependency on their parents.

In deciding where to count boarding school students in 1990, the Census Bureau has considered the possible ramifications of counting such students at the boarding school. Given the age and dependency status of boarding school students compared to college students, the Census Bureau believes the chance of double counting the former is more likely if counted at school than the chance of double counting college students. In addition, there is no known statutory law or legal precedent that stipulates where to count boarding school students. Given the traditional practice of counting such students at the parental home as well as the small numbers involved, the Census Bureau plans to count boarding school students at their parental home in 1990. This procedure represents a variation of the usual residence rule. In this case, however, the Census Bureau believes that due to the nature of the population subgroup, this procedure follows legal requirements.

6. *CREWS OF MERCHANT VESSELS*

In previous censuses, the Census Bureau counted crew members aboard U.S. ocean-going, coastal, and Great Lakes vessels at the port where the ship was

berthed on Census Day. If the ship was not berthed in a U.S. port but was in U.S. territorial waters, we counted the crew at the port of destination, provided that port was inside the United States or its territories. If in territorial waters and headed overseas, we counted the crew at the vessel's homeport. If not in territorial waters, we did not count them. We did not make a special attempt to count persons aboard various other types of ships such as those on inland waterways, fishing vessels, or oil rigs. For 1980, the Census Bureau understood that the crews of these ships tend to be gone from home only a short period of time. Thus, we assumed that a household respondent or neighbor reported them at the usual residence.

Operational factors as well as adherence to the usual residence concept guide the Census Bureau's decision on counting this population subgroup in 1990. Crews of merchant vessels are very transient; while many have no home other than the ship on which they work, others do maintain a home on shore that they consider to be their usual residence. Therefore, the usual residence rule requires that we count them at that usual residence, whether on board ship or on shore.

For crew members whose residence is on board ship, the Census Bureau has options on where to pinpoint the ship geographically on Census Day. The use of homeport is one option, but homeports tend to be chosen for tax purposes; the crew generally does not live there and the ship may never dock there. Enumerating the crew at the port where the ship is docked on Census Day is an option that appears preferable. Similarly, for ships that are not berthed in a U.S. port on Census Day and are in territorial waters, the Census Bureau will count the crew at the port of destina-

tion, provided that the port is within the United States or the U.S. territories. If the port of destination is not in the United States or its territories, we will count the crew at the ship's port of departure. We will not count the crews of merchant ships that are not within territorial waters or that are not American flag vessels.

The Census Bureau plans to treat crews of canneries, freezer ships, and tuna ships the same as ocean-going vessels in the 1990 census. The crews of these vessels are at sea for several months during the fishing season. The Census Bureau will count crew members who report a usual residence on shore at that residence.

The Census Bureau also plans to follow the practice of past censuses and not count crews of vessels on inland waterways, fishing vessels which deploy for short period, and oil rigs. The Census Bureau assumes that such persons maintain a residence on shore and that a household respondent or neighbor will report them at that usual residence.

7. *LAND-BASED MILITARY PERSONNEL*

The Census Bureau traditionally counts land-based members of the Armed Forces, including the U.S. Coast Guard, at the area where they are permanently stationed, provided it is within the United States or the U.S. territories. The use of usual residence to account for members of the Armed Forces is consistent with the criterion used to account for the civilian population.

The Census Bureau also will count military personnel assigned to a temporary duty station at the area of their *permanent duty station*.

8. *CREWS OF MILITARY SHIPS*

Before the 1970 census, the criterion used to determine where to count crews of military ships not deployed, including the U.S. Coast Guard, was the actual location of the ship on Census Day. In the 1970 and 1980 censuses, the Census Bureau counted the crews of such ships at the ship's homeport, regardless of the ship's location on Census Day, unless deployed to the 6th (Atlantic) or 7th (Pacific) Fleet. There were exceptions to this policy, however, in the 1980 census. If the ship's homeport contained total military shipboard strength of 1,000 or more, the Census Bureau allowed a crew member to claim a usual home elsewhere if the usual residence was within 50 miles of the port. If we could locate the address for the crew member, we counted the person at the usual residence; otherwise, the ship was the usual residence.[11] For the 1990 census, the Census Bureau plans to use the usual residence rule to determine where to count crews of military ships not deployed to the 6th or 7th Fleet. If the person's usual residence is the ship, the Census Bureau will count the person at the homeport location. In situations where the homeport includes more than one jurisdiction, the Census Bureau will count the crew at the jurisdiction where the ship is actually docked. The Census Bureau will allow crew numbers to report a usual residence ashore, regardless of the afloat strength of the homeport. We will attempt to match all such reports to the questionnaire for the home address and to match the person to the appropriate household. Thus, we will count crew members at their usual residence, whether it is on board ship or on shore.

9. *MOVERS*

Although resident citizens who move on or near Census Day are part of the resident population, obtaining accurate counts of this population subgroup has been operationally difficult in recent censuses.

The basic issue about counting movers concerns the application of the usual residence concept. Theoretically, the Census Bureau could count persons who move on or near Census Day at their old residence, at their new residence, or at a temporary residence. Thus, the operational problem is one of ensuring that we contact movers at one of the three possible locations but count them at only one. In 1990, the Census Bureau plans to develop enumerator and respondent instructions designed to ensure that we count movers at their usual residence as of Census Day. Thus, the Census Bureau will ask for the Census Day address of persons who moved on or near Census Day and who report that we have not already counted them at that address. We will count such persons at that Census Day address.

10. *MIGRANT WORKERS*

Before the 1980 census, we counted residents of migrant worker camps at the locality that contained the camp, the justification was that the camps have shifting populations composed mainly of persons with no fixed residence. Research after 1970 showed that many migrant workers did in fact have a place they considered as their usual residence. Thus, in the 1980 census, the Census Bureau gave residents of migrant worker camps the option of designating a usual residence other than at the camp where we contacted them. Based on their response, we counted

them either at the reported usual residence or at the camp where we contacted them.[11]

For the 1990 census, the Census Bureau plans to continue the practice of allowing residents of migrant worker camps to designate a usual residence other than the camp. We will count them at the usual residence if they report one. If they do not report a usual residence we will count them at the migrant worker camp.

11. *INSTITUTIONALIZED RESIDENTS*

The institutionalized population consists of all residents living under formally authorized, supervised care or custody. The facilities that house this population include correctional schools, penitentiaries, wards for juveniles, specialized hospitals, nursing homes for the elderly, and homes for the physically and mentally handicapped.[11]

For the 1990 census, the Census Bureau plans to differentiate between long-term and short-term facilities. We will count persons residing in long-term facilities (for example, penitentiaries, and mental hospitals) as residents of the institution. The Census Bureau will count persons residing in short-term facilities (for example, county jails and general hospitals) at their usual place of residence if they have one. This practice is consistent with the practices of recent censuses in applying the usual residence concept to persons residing in such facilities.

V. *CONCLUSION*

Enumeration and residence concepts for the 1990 census provide the basic framework for meeting the goal of the census. We will achieve that goal by appropriate strate-

gies, methods, and procedures. Developing the universe of interest within the legal parameters by carefully defining who and where to count is a critical component of the Census Bureau's concept of enumeration for the 1990 census.

In addressing whom to count, the concept of enumeration for 1990 is based on the Constitution and applicable statutory law which the Census Bureau has traditionally understood to require that all residents, regardless of citizenship or legal status, are part of the universe of interest which we must attempt to count. The first Census Act of 1790, based on an understanding of the constitutional mandate, established the concept of counting residents, not just citizens, and is consistent with the conceptual basis for the past 20 censuses.

The first census also established the concept of usual residence, and that is the conceptual basis for determining where to count persons in the 1990 census. The adoption of a usual residence concept is consistent with the goal of obtaining accurate counts at all geographic levels as well.

The enumeration and residence concepts for 1990 will ensure that the 21st Decennial Census of Population and Housing is the most complete and accurate of any in our country's history.

NOTES

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[5] Levine, D. B., Memorandum to Courtenay M. Slater, June 18, 1979, Subject: The Enumeration of Americans Overseas in the 1980 Census. U.S. Bureau of the Census. Washington, D.C.

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[8] Courtland, S., Memorandum to Peter Bounpane, July 13, 1984, Subject: Legal Issues Relating to the 1990 Census: Memorandum No. 1. U.S. Bureau of the Census, Washington, D.C.

[9] Miskura, S. M., Memorandum to William P. Butz, March 19, 1986, Subject: 1990 Enumeration and Residence Rules. U.S. Bureau of the Census, Washington, D.C.

[10] 1990 Research Paper on Enumeration and Residence Rules. Unpublished paper. U.S. Bureau of the Census, Washington, D.C., May 1985.

[11] *1990 Census Committee on Special Enumeration Practices, Final Report.* Washington, D.C.: U.S. Bureau of the Census, May 1985.

NOTE: **This Report is not reproduced with the Stipulation of Facts because it appears at pages 181-211 of the Administrative Record**

Attachment 2

DECENNIAL CENSUS RESIDENCE RULES AND ENUMERATION PRINCIPLES

A Report

Prepared for the Bureau of the Census by

CEC Associates
1522 K Street N.W., Suite 522
Washington, D.C. 20005
(202) 682-1350

February 1987

APPENDIX E.
Facsimiles of Respondent Instructions and Questionnaire Pages

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EXHIBIT B

Your Guide for the

1990 U.S. Census Form

This guide gives helpful information on filling out your census form. If you need more help, call the local U.S. census office. **The telephone number is on the cover of the questionnaire.** After you have filled out your form, please return it in the envelope we have provided.

On the inside	Page
How to fill out your census form	2
Example	2
Your answers are confidential	2
Instructions for the census questions	3–5
What the census is about	5
Why the census asks certain questions	5

CENSUS '90

U.S. DEPARTMENT OF COMMERCE
BUREAU OF THE CENSUS

EXHIBIT B

How to Fill Out Your Census I

Please use a black lead pencil only. Black lead pencil is better to use than ballpoint or other pens. Most questions ask you to fill in the circle, or to print the information. See Examples below.

Make sure you print answers for everyone in this household. If someone in the household, such as a roomer or boarder, does not want to give you all the information for the form, print at least the person's name and answer questions 2 and 3. A census taker will call to get the other information directly from the person.

There may be a question you cannot answer exactly. For example, you might not know the age of an elderly person or the price for which your house would sell. Ask someone else in your household; if no one knows, give your best estimate.

Instructions for individual questions begin on page 3 of this guide. They will help you to understand the questions and answer them correctly.

If you have a question about filling out the census form or need assistance, call the local U.S. census office. The telephone number is given on the cover of the questionnaire.

If you do not mail back your census form, a census taker will be sent out to assist you. But it saves time and your taxpayer dollars if you fill out the form yourself and mail it back.

Example

a. Age	b. Year of birth	a. Age	b. Year of birth
41	1949	09	1981

Your Answers Are Confidential

The law authorizing the census (Title 13, U.S. Code) also provides that your answers are confidential. No one except census workers may see your completed form and they can be fined and/or imprisoned for any disclosure of your answers. Only after 72 years can your individual census form become available to other government agencies (whether federal, state, county, or local). Until then, no other person or business can see your individual report.

The same law that protects the confidentiality of your answers requires that you provide the information asked in this census to the best of your knowledge.

Information collected from the decennial census is used for a variety of statistical purposes. Census information is used to find out where funding is most needed for schools, health centers, highways, and other services. Census results are used by members of public and private groups—including community organizations—and by businesses and industries, as well as by agencies at all levels of government.

Instructions for / Questions 1a through 7

1a. List everyone who lives at this address in question 1a. If you are not sure if you should list a person, see the rules on page 1 of the census form. If you are still not sure, answer as best you can and fill in "Yes" for question H1a or H1b, as appropriate.

If there are more than seven people in your household, please list all the persons in question 1a, complete the form for seven people, and mail it back in the enclosed envelope. A census taker will call to obtain the information for the additional persons.

b. If everyone listed in question 1a usually lives at another address(es), print the address(es) in 1b.

2. Fill one circle to show how each person is related to the person in column 1.

If Other relative of the person in column 1, print the exact relationship such as son-in-law, daughter-in-law, grandparent, nephew, niece, mother-in-law, father-in-law, cousin, and so on.

If the Stepson/stepdaughter of the person in column 1 also has been legally adopted by the person in column 1, mark Stepson/stepdaughter but do not mark Natural-born or adopted son/daughter. In other words, Stepson/stepdaughter takes precedence over Adopted son/daughter.

4. Fill ONE circle for the race each person considers himself/herself to be.

If you fill the Indian (Amer.) circle, print the name of the tribe or tribes in which the person is enrolled. If the person is not enrolled in a tribe, print the name of the principal tribe(s).

If you fill the Other API circle (under Asian or Pacific Islander (API)), only print the name of the group to which the person belongs. For example, the Other API category includes persons who identify as Burmese, Fijian, Hmong, Indonesian, Laotian, Bangladeshi, Pakistani, Tongan, Thai, Cambodian, Sri Lankan, and so on.

If you fill the Other race circle, be sure to print the name of the race.

If the person considers himself/herself to be White, Black or Negro, Eskimo or Aleut, fill one circle only. Please do not print the race in the boxes.

The Black or Negro category also includes persons who identify as African-American, Afro-American, Haitian, Jamaican, West Indian, Nigerian, and so on.

All persons, regardless of citizenship status, should answer this question.

5. Print age at last birthday in the space provided (print "00" for babies less than 1 year old). Fill in the matching circle below each box. Also, print year of birth in the space provided. Then fill in the matching circle below each box. For an illustration of how to complete question 5, see the Example on page 2 of this guide.

6. If the person's only marriage was annulled, mark Never married.

7. A person is of Spanish/Hispanic origin if the person's origin (ancestry) is Mexican, Mexican-Am., Chicano, Puerto Rican, Cuban, Argentinean, Colombian, Costa Rican, Dominican, Ecuadorian, Guatemalan, Honduran, Nicaraguan, Peruvian, Salvadoran, from other Spanish-speaking countries of the Caribbean or Central or South America, or from Spain.

If you fill the Yes, other Spanish/Hispanic circle, print one group.

A person who is not of Spanish/Hispanic origin should answer this question by filling the No (not Spanish/Hispanic) circle. Note that the term "Mexican-Am." relates only to persons of Mexican origin or ancestry.

All persons, regardless of citizenship status, should answer this question.

Instructions for Questions H1a through H6

H1a. Refer to the list of persons you entered in question 1a on page 1. If you left anyone out of your list because you were not sure if the person(s) should be listed, answer question H1a as Yes. Then enter the name(s) and reason(s) why you did not list the person(s) on the lines provided. Otherwise, answer question H1a as No.

b. If you included anyone on your list even though you were not sure that you should list the person(s), answer question H1b as Yes. Then enter the name(s) and reason(s) why you listed the person(s) on the lines provided. Otherwise, answer question H1b as No.

H2. Fill only one circle.

Count all occupied and vacant apartments in the house or building. Do not count stores or office space.

Detached means there is open space on all sides, or the house is joined only to a shed or garage. *Attached* means that the house is joined to another house or building by at least one wall that goes from ground to roof. An example of A one-family house attached to one or more houses is a house in a row of houses attached to one another.

A mobile home or trailer that has had one or more rooms added or built onto it should be counted as a *one-family detached house*; a porch or shed is not considered a room.

H3. Count only whole rooms in your house, apartment, or mobile home used for living purposes, such as living rooms, dining rooms, kitchens, bedrooms, finished recreation rooms, family rooms, etc. Do not count bathrooms, kitchenettes, strip or pullman kitchens, utility rooms, foyers, halls, half-rooms, porches, balconies, unfinished attics, unfinished basements, or other unfinished space used for storage.

H4. Housing is owned if the owner or co-owner lives in it. Mark Owned by you or someone in this household with a mortgage or loan if the house, apartment, or mobile home is mortgaged or there is a contract to purchase. Mark Owned by you or someone in this household free and clear (without a mortgage) if there is no mortgage or other debt. If the house, apartment, or mobile home is owned but the land is rented, mark this question to show the status of the house, apartment, or mobile home.

Mark Rented for cash rent if any money rent is paid, even if the rent is paid by persons who are not members of your household, or by a federal, state, or local government agency.

Mark Occupied without payment of cash rent if the unit is not owned or being bought by the occupants and if money rent is not paid or contracted. The unit may be owned by friends or relatives who live elsewhere and who allow occupancy without charge. A house or apartment may be provided as part of wages or salary. Examples are: caretaker's or janitor's house or apartment; parsonages; tenant farmer or sharecropper houses for which the occupants do not pay cash rent; or military housing.

H5a. Answer H5a and H5b if you live in a one-family house or mobile home; include only land which you own or rent.

b. A business is easily recognized from the outside; for example, a grocery store or barber shop. A medical office is a doctor's or dentist's office regularly visited by patients.

H6. If this is a house, include the value of the house, the land it is on, and any other structures on the same property. If the house is owned but the land is rented, estimate the combined value of the house and the land. If this is a condominium unit, estimate the value for your house or apartment including your share of the common elements. If this is a mobile home, include the value of the mobile home and the value of the land. If you rent the land, estimate the value of the rented land and add it to the value of the mobile home.

Instructions Questions H7a and H7b

H7a. Report the rent agreed to or contracted for, even if the rent for your house, apartment, or mobile home is unpaid or paid by someone else.

If rent is paid:	Multiply rent by:	If rent is paid:	Divide rent by:
By the day	30	4 times a year	3
By the week	4	2 times a year	6
Every other week	2	Once a year	12

b. Answer Yes if meals are included in the monthly rent payment, or you must contract for meals or a meal plan in order to live in this building.

What the Census Is About – Some Questions and Answers

Why are we taking a census?

The most important reason for taking a decennial census is to determine how many representatives each state will have in Congress.

What does the Census Bureau do with the information you provide?

The individual information collected in the census is grouped together into statistical totals. Information such as the number of persons in a given area, their ages, educational background, the characteristics of their housing, etc., enable government, business, and industry to plan more effectively.

How long have we been taking the census?

The first census was taken in 1790 in accordance with the requirement in the 1st article of the constitution. A census has been taken every 10 years since. The 1990 Decennial Census marks the 200th anniversary of the census.

How are you being counted?

Census forms are delivered to all households a few days before census day. Households are requested to fill out the form and mail it back to the census office.

Why the Census Asks Certain Questions

Here are a few reasons for asking some of the questions.

It is as important to get information about people and their houses as it is to count them.

Name? Names help make sure that everyone in a household is counted, but that no one is counted twice.

Value or rent? Government and planning agencies use answers to these questions in combination with other information to develop housing programs to meet the needs of people at different economic levels.

CE.SUS '90

OFFICIAL 1990 U.S. CENSUS FORM

Thank you for taking time to complete and return this census questionnaire. It's important to you, your community, and the Nation.

The law requires answers but guarantees privacy.

By law (Title 13, U.S. Code), you're required to answer the census questions to the best of your knowledge. However, the same law guarantees that your census form remains confidential. For 72 years–or until the year 2062–only Census Bureau employees can see your form. No one else–no other government body, no police department, no court system or welfare agency–is permitted to see this confidential information under any circumstances.

How to get started–and get help.

Start by listing on the next page the names of all the people who live in your home. Please answer all questions with a black lead pencil. You'll find detailed instructions for answering the census in the enclosed guide. If you need additional help, call the toll-free telephone number to the left, near your address.

Please answer and return your form promptly.

Complete your form and return it by April 1, 1990 in the postage-paid envelope provided. Avoid the inconvenience of having a census taker visit your home.

Again, thank you for answering the 1990 Census. Remember: Return the completed form by April 1, 1990.

Para personas de habla hispana –
(For Spanish-speaking persons)

Si usted desea un cuestionario del censo en español, llame sin cargo alguno al siguiente número: 1-800-CUENTAN
(o sea 1-800-283-6826)

U.S. Department of Commerce
BUREAU OF THE CENSUS

FORM D-1

OMB No. 0607-0638
Approval Expires 07/31/91

The 1990 census must count every person at his or her "usual residence." This means the place where the person lives and sleeps most of the time.

1a. List on the numbered lines below the name of each person living here on Sunday, April 1, including all persons staying here who have no other home. If EVERYONE at this address is staying here temporarily and usually lives somewhere else, follow the instructions given in question 1b below.

Include

- Everyone who usually lives here such as family members, housemates and roommates, foster children, roomers, boarders, and live-in employees
- Persons who are temporarily away on a business trip, on vacation, or in a general hospital
- College students who stay here while attending college
- Persons in the Armed Forces who live here
- Newborn babies still in the hospital
- Children in boarding schools below the college level
- Persons who stay here most of the week while working even if they have a home somewhere else
- Persons with no other home who are staying here on April 1

Do NOT include

- Persons who usually live somewhere else
- Persons who are away in an institution such as a prison, mental hospital, or a nursing home
- College students who live somewhere else while attending college
- Persons in the Armed Forces who live somewhere else
- Persons who stay somewhere else most of the week while working

Print last name, first name, and middle initial for each person. Begin on line 1 with the household member (or one of the household members) in whose name this house or apartment is owned, being bought, or rented. If there is no such person, start on line 1 with any adult household member.

	LAST	FIRST	INITIAL		LAST	FIRST	INITIAL
1				7			
2				8			
3				9			
4				10			
5				11			
6				12			

1b. If EVERYONE is staying here only temporarily and usually lives somewhere else, list the name of each person on the numbered lines above, fill this circle ⟶ ○ and print their usual address below. DO NOT PRINT THE ADDRESS LISTED ON THE FRONT COVER.

House number — Street or road/Rural route and box number — Apartment number

City — State — ZIP Code

County or foreign country — Names of nearest intersecting streets or roads

NOW PLEASE OPEN THE FLAP TO PAGE 2 AND ANSWER ALL QUESTIONS FOR THE FIRST 7 PEOPLE LISTED. USE A BLACK LEAD PENCIL ONLY.

Please fill one column → for each person listed in Question 1a on page 1.	PERSON 1 Last name First name Middle name	PERSON 2 Last name First name Middle name
2. How is this person related to PERSON 1? Fill ONE circle for each person. If Other relative of person in column 1, fill circle and print exact relationship, such as mother-in-law, grandparent, son-in-law, niece, cousin, and so on.	START in this column with the household member (or one of the members) in whose name the home is owned, being bought, or rented. If there is no such person, start in this column with any adult household member.	If a RELATIVE of Person 1: ○ Husband/wife ○ Brother/sister ○ Natural-born or adopted son/daughter ○ Father/mother ○ Grandchild ○ Other relative ○ Stepson/stepdaughter If NOT RELATED to Person 1: ○ Roomer, boarder, or foster child ○ Unmarried partner ○ Housemate, roommate ○ Other nonrelative
3. Sex Fill ONE circle for each person.	○ Male ○ Female	○ Male ○ Female
4. Race Fill ONE circle for the race that the person considers himself/herself to be. If Indian (Amer.), print the name of the enrolled or principal tribe. If Other Asian or Pacific Islander (API), print one group, for example: Hmong, Fijian, Laotian, Thai, Tongan, Pakistani, Cambodian, and so on. If Other race, print race.	○ White ○ Black or Negro ○ Indian (Amer.) (Print the name of the enrolled or principal tribe.) ○ Eskimo ○ Aleut Asian or Pacific Islander (API) ○ Chinese ○ Japanese ○ Filipino ○ Asian Indian ○ Hawaiian ○ Samoan ○ Korean ○ Guamanian ○ Vietnamese ○ Other API ○ Other race (Print race)	○ White ○ Black or Negro ○ Indian (Amer.) (Print the name of the enrolled or principal tribe.) ○ Eskimo ○ Aleut Asian or Pacific Islander (API) ○ Chinese ○ Japanese ○ Filipino ○ Asian Indian ○ Hawaiian ○ Samoan ○ Korean ○ Guamanian ○ Vietnamese ○ Other API ○ Other race (Print race)
5. Age and year of birth a. Print each person's age at last birthday. Fill in the matching circle below each box. b. Print each person's year of birth and fill the matching circle below each box.	a. Age 0 0 0 0 0 0 1 0 1 0 1 0 2 0 2 0 3 0 3 0 4 0 4 0 5 0 5 0 6 0 6 0 7 0 7 0 8 0 8 0 9 0 9 0 b. Year of birth 1 1 0 8 0 0 0 0 0 9 0 1 0 1 0 2 0 2 0 3 0 3 0 4 0 4 0 5 0 5 0 6 0 6 0 7 0 7 0 8 0 8 0 9 0 9 0	a. Age 0 0 0 0 0 0 1 0 1 0 1 0 2 0 2 0 3 0 3 0 4 0 4 0 5 0 5 0 6 0 6 0 7 0 7 0 8 0 8 0 9 0 9 0 b. Year of birth 1 1 0 8 0 0 0 0 0 9 0 1 0 1 0 2 0 2 0 3 0 3 0 4 0 4 0 5 0 5 0 6 0 6 0 7 0 7 0 8 0 8 0 9 0 9 0
6. Marital status Fill ONE circle for each person.	○ Now married ○ Separated ○ Widowed ○ Never married ○ Divorced	○ Now married ○ Separated ○ Widowed ○ Never married ○ Divorced
7. Is this person of Spanish/Hispanic origin? Fill ONE circle for each person. If Yes, other Spanish/Hispanic, print one group.	○ No (not Spanish/Hispanic) ○ Yes, Mexican, Mexican-Am., Chicano ○ Yes, Puerto Rican ○ Yes, Cuban ○ Yes, other Spanish/Hispanic (Print one group, for example: Argentinean, Colombian, Dominican, Nicaraguan, Salvadoran, Spaniard, and so on.)	○ No (not Spanish/Hispanic) ○ Yes, Mexican, Mexican-Am., Chicano ○ Yes, Puerto Rican ○ Yes, Cuban ○ Yes, other Spanish/Hispanic (Print one group, for example: Argentinean, Colombian, Dominican, Nicaraguan, Salvadoran, Spaniard, and so on.)
FOR CENSUS USE →	○ ○	○ ○

EXHIBIT C

[SEAL] U.S. DEPARTMENT OF JUSTICE
Office of Legislative Affairs

Office of the Assistant Attorney General
Washington, D.C. 20620

[APR 14, 1988]

Honorable James C. Miller III
Director
Office of Management and Budget
Washington, D.C. 20603

Dear Mr. Miller:

This responds to your request for the views of the Department of Justice on H.R. 3639, a bill to prevent distortions in the reapportionment of the House of Representatives caused by the use of census population figures which include aliens, and H.R. 3814, "Relating to decennial censuses of population." In principal part, H.R. 3639 would eliminate illegal aliens from the United States census tabulation when apportioning representatives in Congress among the states. Like H.R. 3639, H.R. 3814 would exclude illegal aliens from the census count. It would include for apportionment purposes, however, members of the armed forces, civilian employees of the Department of Defense, and dependents of such members or employees, living overseas. For the reasons discussed below, we oppose passage of these bills because they raise serious constitutional problems.

Section two of the Fourteenth Amendment to the Constitution provides that:

> Representatives shall be apportioned among the several States according to their respective numbers,

> counting the whole number of persons in each State, excluding Indians not taxed.

U.S. Const., amend. XIV, sec. 2.[1] This constitutional provision is implemented by 13 U.S.C. 141(b).[2] Section 2 of H.R. 3639 would add a new paragraph (g) to 13 U.S.C. 141 to require the Secretary of Commerce to

> make such adjustments in total population figures as may be necessary, using such methods and procedures as the Secretary determines appropriate, in order that aliens in the United States in violation of the immigration laws shall not be counted in tabulating population for purposes of subsection (b) of this section.

The legislative history accompanying section 2 of the Fourteenth Amendment makes clear that Congress intended for all persons, including aliens residing in this country, to be included in the "whole number of persons in each State." *Id.*

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[1] Section 2 replaces, in part, the provision in Article I, sec. 2, cl. 3 of the Constitution that provided:

> Representatives . . . shall be apportioned among the several States . . . according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons . . . three fifths of all other Persons.

Although we have not found any cases interpreting the breadth of Article I, the Founding Fathers were aware that the census, and therefore apportionment, would be based on the number of State inhabitants, not of voters. See, e.g., *The Federalist Papers* (C. Rossiter, ed.), No. 54, at 338.

[2] Section 141(b) provides:

> The tabulation of total population by States under [the census] as required for the apportionment of Representatives in Congress among the several States shall be completed within 9 months after the census date and reported by the Secretary to the President of the United States.

The end of the Civil War and the freeing of the slaves meant an end to apportionment based on the "three fifths" provision of Article 1. See note 1. The Reconstruction Congress realized that once readmitted, the former Confederate states would increase their population base by forty percent, adding twelve Representatives to their prewar total of eighteen.[3] In an effort to undermine this growth in political power before these states were readmitted to the Union, the Thirty-ninth Congress examined various formulas designed to reduce representation whenever states, as expected, discriminated against portions of their male population by excluding them from voting on the basis of race.

For example, there was significant support in the Thirty-Ninth Congress for a proposal that representation be based on the number of male voters over the age of twenty-one. See, e.g., Cong. Globe, 39th Cong., 1st Sess. 404 (1866). However, this proposal met serious resistance from many of the Northern states, especially in New England. These states had disproportionately large populations of non-voters, such as women (large numbers of men had left their homes to pioneer in the west) and aliens.[4] As Rep. Conk-

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[3] G. Zuckerman, *A Consideration of the History and Present Status of Section 2 of the Fourteenth Amendment,* 30 Ford. L. Rev. 93, 94 (1961) (Zuckerman).

[4] Zuckerman, *supra* note 3, at 95. As Sen. Wilson noted:

> How [does this proposal affect] the loyal States? It throws out of the basis at least two and a half millions of unnaturalized foreign-born men and women, and by this we lose at least fifteen Representatives . . . . in 1860 there were in the loyal States 3,856,628 unnaturalized persons of foreign birth, and in the rebel States 233,651. I estimate that Massachusetts would lose one Representative certainly, and probably two, by this change; that New York would lose at least four, Pennsylvania two, Ohio two; and other States would lose in their representation.

Cong. Globe, 39th Cong., 1st Sess. 1256 (1866).

ling, one of the original drafters of the Fourteenth Amendment, noted when defending his amendment to count persons rather than citizens, "[m]any of the large States now hold their representation in part by reason of their aliens, and the Legislatures and people of these States are to pass upon the amendment. It must be acceptable to them." Cong. Globe, 39th Cong., 1st Sess. 359 (1866).

Faced with extensive debate over the amendment's language, the Republicans became concerned that the measure would not pass the Senate.[5] They therefore went into caucus, agreeing to be bound by its decision, and adopted the present language regarding "persons" rather than "citizens." Notwithstanding the protests of opponents who bitterly denounced this language as nothing more than a political compromise designed to ensure passage of the amendment,[6] the Republicans held the majority and the amendment, apportioning representation on the "whole number of persons" in each state, was passed.

Thus, the Congress that passed the Fourteenth Amendment in 1866 not only recognized that aliens would be counted in the census but insisted upon their inclusion as part of a compromise designed to ensure that the amendment would be passed by the industrial states. They did so notwithstanding their acknowledgment that aliens were not *bona fide* members of the body politic. They rejected arguments that representation should be based on people with permanent ties to the country. They consciously chose to include aliens to advance their dual concerns: ensuring passage of the amendment by the northern states and, denial to the south of any additional representation in Congress.[7]

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[5] Zuckerman, *supra* note 3, at 105.

[6] Cong. Globe, 39th Cong., 1st Sess. 404, 405 (1866) (statement of Rep. Lawrence). See also *id.* at 2939 (statement of Sen. Hendricks).

[7] See generally Note, *Demography and Distrust: Constitutional Issues of the Federal Census*, 94 Harv. L. Rev. 841, 846-48 (1981).

It is noteworthy that the Supreme Court, in analyzing section 1 of the Fourteenth Amendment, has read the word "person" to include illegal aliens. "Whatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments." *Plyler v. Doe*, 457 U.S. 202, 210 (1982) (citations omitted), reh'g denied 458 U.S. 1131 (1982). It would seem reasonable to assume that those whom the drafters of the Fourteenth Amendment intended to include in the word "persons" in section 1 of the amendment are the same "persons" included by section 2.

We must note that the Reconstruction Congress did not discuss the issue of illegal aliens when it debated the Fourteenth Amendment.[8] It was, however, possible to be an illegal alien in 1866. The United States has had a statute since 1798 governing arrest and exclusion of aliens from hostile countries. Act of July 6, 1798, ch. 66, 1 Stat. § 77 (Act), codified at 50 U.S.C. 21. The President is authorized to arrest, secure and remove, with the aid of the courts and the federal marshals, any such aliens he identifies. Moreover, this statutory authority had been exercised prior to 1866.[9] Thus, although the issue was not raised in the debate over the Fourteenth Amendment, certain classes of aliens could be excluded from the United States in 1866 and removed by order of the President if they attempted to return.[10]

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[8] C. Gordon and H. Rosenfeld, 1 *Immigration Law & Procedure*, at 1-8 (1985).

[9] *Lockington v. Smith*, 15 Fed. Cas. 758 (C.C. Pa. 1817) (No. 8448); *Lockington's Case*, Brightly N.P. 269 (Pa. 1813).

[10] Moreover, subsequent Congresses have acknowledged, by their efforts to exclude aliens from the census, that the Fourteenth Amend-

The Department of Justice has advised previous Congresses considering identical legislation that aliens must be included within the census for purposes of apportioning congressional Representatives,[11] and has adopted that position in court.[12] We have reexamined this position and continue to believe that it is sound. Accordingly, we find that to the extent that H.R. 3639 and H.R. 3814 would exclude illegal aliens from the census, they are unconstitutional.

We turn now to the question of whether it is constitutional to include in any tabulation of population for purposes of the apportionment any members of the armed forces, civilian employees of the Department of Defense (DOD), or dependents of such members or employees,

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ment requires the counting of all aliens. The 71st and 72nd Congresses debated passage of constitutional amendments that would have excluded aliens in the count for apportionment of representatives. See H.R. Rep. 2761, 71st Cong., 3d Sess. (1931); H.R. Rep. 823, 72d Cong., 1st Sess. (1932). The Senate legal counsel had earlier issued an opinion concluding that aliens could not be excluded. 71 Cong. Rec. 1821 (1929). In 1940, a bill to exclude aliens was defeated. See *e.g.*, 86 Cong. Rec. 4372 (1940) (statement of Rep. Cellar) ("If you want aliens out, you must amend the Constitution").

[11] *See* e.g., Testimony of David A. Strauss, Attorney-Adviser, Office of Legal Counsel, 1980 Census: Counting Illegal Aliens, Hearing on S. 2366 Before the Subcomm. on Energy, Nuclear Proliferation and Federal Services of the Senate Comm. on Governmental Affairs, 96th Cong., 2d Sess., at 96 (1980) (Hearing).

[12] See Memorandum of Points and Authorities in Support of Defendant's Motion to Dismiss the Action or, in the Alternative, for Summary Judgement and in Opposition to Plaintiff's Application for a Preliminary Injunction, filed in *Federation for American Immigration Reform v. Klutznick*, 486 F. Supp. 564, 576-77 (D.D.C.) (3-judge court) (*FAIR*), appeal dismissed, 447 U.S. 916 (1980). The Memorandum is reprinted in the Hearings, supra note 11, at 125. The *FAIR* court endorsed the government's position in *dictum*. See 486 F. Supp. at 576-77 (reading section 2 to include all aliens) (dictum).

when any such individuals are assigned to a post outside the United States. While we continue to review the case law and legislative history pertinent to resolution of this question, we note that throughout the debates on section 2 of the Fourteenth Amendment, there seems to be a premise that the census would count inhabitants of the United States, and not individuals who did not reside in one of the states.[13] Accordingly, we entertain serious doubts as to the constitutionality of any legislation that would seek to include for apportionment purposes military personnel, DOD civilian employees, or their dependents, when such individuals live outside the United States. We therefore must oppose passage of this provision in H.R. 3814 at this time.

The Office of Management and Budget has advised this Department that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

/s/ JACK E. PERKINS
for Thomas M. Boyd
Acting Assistant Attorney General

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[13] The Department of Commerce advises that the Census Bureau has never counted for apportionment purposes U.S. Ambassadors, military personnel or State Department personnel stationed abroad. The Bureau's practice is based upon the concept of usual residence, which historically has been defined as where a person lives and sleeps most of the time.

EXHIBIT D

POSSIBLE 1990 APPORTIONMENTS FOR MASSACHUSETTS UNDER VARIOUS METHODS

	Exact Q	Adam	Harm	EQPR	Webs	Jeff	Ham
Apportionment Population	10.532	10	10	10	11	11	11
Resident Population	10.549	10	10	11	11	11	11

EXACT Q = EXACT QUOTA (The integer and fraction of seats due a state given its population)
ADAM = ADAMS (SMALLEST DIVISORS) METHOD – Never used
HARM = DEAN (HARMONIC MEAN) METHOD – Never used
EQPR = EQUAL PROPORTIONS (HILL) METHOD – Used 1940-1990
WEBS = WEBSTER (MAJOR FRACTIONS) METHOD – Used 1840, 1880-1910, 1930
JEFF = JEFFERSON (GREATEST DIVISORS) METHOD – Used 1790-1830
HAM = HAMILTON/VINTON METHOD – Used 1850-1870

EXHIBIT E

MASSACHUSETTS' CONGRESSIONAL ALLOCATION 1940-1990

	Quota	Hill	Webster
1940	14.333	14	14
1950	13.612	14	14
1960	12.543	12	13
1970	12.208	12	12
1980	11.049	11	11
1990	10.532	10	11

ORDER NOTING PROBABLE JURISDICTION

ORDER LIST

FRIDAY, MARCH 20, 1992

PROBABLE JURISDICTION NOTED

91-1502 FRANKLIN, SEC. OF COMMERCE V. MASSACHUSETTS, ET AL.

The motion to expedite consideration of the statement as to jurisdiction is granted. In this case probable jurisdiction is noted. The motion to permit filings initially in typewritten form is granted. The joint appendix is to be filed by Wednesday, March 25, 1992. If the State of Washington should wish to file any further papers on the application for stay, it must do so by Wednesday, March 25, 1992. Briefs on the merits are to be filed by the parties with the Clerk of this Court and served upon the parties on or before 3 p.m. Monday, April 13, 1992. Replies thereto, if any, are to be filed with the Clerk and served upon the parties on or before 3 p.m. Monday, April 20, 1992. The case is set for oral argument on Tuesday, April 21, 1992.

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NOT ARGUMENT

(1)

Supreme Court, U.S.
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OFFICE OF THE CLERK

No. 91-1502

In the Supreme Court of the United States

OCTOBER TERM, 1991

BARBARA FRANKLIN, SECRETARY OF COMMERCE, ET AL.,
APPELLANTS

v.

COMMONWEALTH OF MASSACHUSETTS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR THE APPELLANTS

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

JOHN G. ROBERTS, JR.
Deputy Solicitor General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

MICHAEL JAY SINGER
MARK B. STERN
LORI M. BERANEK
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

The three-judge district court held that the Census Clause of the Constitution (Art. I, § 2, Cl. 3) and the Census Act (13 U.S.C. 141) permit the Secretary of Commerce to include federal personnel stationed abroad (and their dependents) in the state population totals on which the apportionment of Representatives is based. However, the court held that the Secretary's manner of doing so following the 1990 census was arbitrary and capricious, in violation of the Administrative Procedure Act (APA), 5 U.S.C. 706(2)(A), because, in the court's view, he did not furnish an adequate justification. The questions presented are:

1. Whether judicial review of the apportionment of Representatives, and the underlying census counts including federal personnel stationed abroad, is barred by virtue of the APA's exceptions for situations in which "statutes preclude judicial review" and "agency action is committed to agency discretion by law," 5 U.S.C. 701(a), and the inapplicability of the APA to the President.

2. Whether, if judicial review is not barred, the Secretary's report of State population totals and the apportionment of Representatives was arbitrary and capricious because of the inclusion of federal personnel stationed abroad.

3. Whether, if the district court correctly found a violation of the APA, it properly ordered appellants to effect a new apportionment of Representatives with the personnel abroad thrown out of the underlying census count, rather than remanding the matter to the Secretary for further proceedings.

PARTIES TO THE PROCEEDINGS

The appellants herein, who were defendants in the district court, are Barbara Franklin, Secretary of Commerce (substituted as a party pursuant to Rule 35.3 of this Court); Mark W. Plant, Acting Under Secretary of Commerce for Economic Affairs (also substituted pursuant to Rule 35.3); the Bureau of the Census; Barbara Bryant, Director of the Bureau of the Census; and George Herbert Walker Bush, the President of the United States. Donnald K. Anderson, the Clerk of the United States House of Representatives, also was a defendant in the district court.

The appellees in this Court, who were the plaintiffs below, are the Commonwealth of Massachusetts and two of its registered voters, Edward F. Berlin and Karen J. Kepler.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1502

BARBARA FRANKLIN, SECRETARY OF COMMERCE, ET AL., APPELLANTS

v.

COMMONWEALTH OF MASSACHUSETTS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR THE APPELLANTS

OPINIONS BELOW

The opinion of the three-judge district court (J.S. App. 1a-84a) and its order denying reconsideration and a stay (J.S. App. 85a-93a) are not yet reported.

JURISDICTION

The judgment of the three-judge district court (J.S. App. 94a-96a) was entered on February 20, 1992, and the notice of appeal (J.S. App. 97a-98a) was filed on March 16, 1992. Probable jurisdiction was noted on March 20, 1992. J.A. 244. The jurisdiction of this Court is invoked under 28 U.S.C. 1253. See J.S. 16 n.7.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 2, Clause 3 and Section 8, Clause 18 of Article I of the United States Constitution; Sections 2 and 5 of the Fourteenth Amendment; 2 U.S.C. 2a; 5 U.S.C. 701(a) and 706; and 13 U.S.C. 141(a) and (b), are reproduced at App., *infra*, 1a-6a.

STATEMENT

The Commonwealth of Massachusetts and two of its registered voters brought this suit to challenge the decision by the Secretary of Commerce to include in the 1990 census count for each State those federal personnel stationed abroad who designated that State as their permanent "home of record" when they entered the Armed Forces, or who were found to have a sufficient nexus to that State under an alternative standard. The court rejected appellees' contentions that inclusion of federal personnel abroad (and their dependents) in the enumeration on which the apportionment of Representatives is based violates the Constitution (Art. I, § 2, Cl. 3; Amend. XIV, § 2) and the Census Act (13 U.S.C. 141). However, concluding that the conduct of the census is subject to judicial review under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, the court held that the particular *manner* of including personnel abroad was arbitrary and capricious, because, in its view, the Secretary of Commerce did not furnish an adequate explanation or factual justification for the method of allocation. Rather than remanding the matter to the Secretary, however, the court ordered appellants to effect a new apportionment of the House of Representatives, with the personnel abroad *excluded*. Under the district court's order, a total of 919,810 people must be eliminated from the apportionment counts for the States. Stipulation of Facts (Stip.) ¶ 53 (J.A. 185).

1. Article I, Section 2, Clause 3 of the Constitution provides that "Representatives * * * shall be apportioned among the several States * * * according to their respective Numbers." It further provides that "[t]he actual Enumeration shall be made * * * in such Manner as they [the Congress] shall by Law direct." Pursuant to the latter provision, Congress has directed the Secretary of Commerce to conduct a census, as of April 1, 1980 and every tenth year thereafter, "in such form and content as he may determine." 13 U.S.C. 141(a). The Census Act further provides that "[t]he tabulation of total population by States * * * as required for the apportionment of

Representatives in Congress among the several States shall be completed within nine months after the census date and reported by the Secretary to the President of the United States." 13 U.S.C. 141(b).

Under the Apportionment Act, the President then must transmit to Congress, during the first week of its next session, "a statement showing the whole number of persons in each State" (as ascertained under the decennial census just completed) "and the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives by the method known as the method of equal proportions." 2 U.S.C. 2a(a). Within 15 calendar days after receipt of the President's statement, the Clerk of the House of Representatives must send to the Governor of each State "a certificate of the number of Representatives to which such State is entitled under this section." 2 U.S.C. 2a(b).

Following the 1990 decennial census, the Secretary of Commerce submitted his report to the President on December 26, 1990; the President transmitted his statement to Congress on January 3, 1991; and the Clerk of the House sent his certificates to the Governors on January 16, 1991. The Clerk certified that Massachusetts is entitled to ten Representatives, a loss of one from the 1980 apportionment. J.S. App. 2a n.1.

2. The concept of "usual residence" has been the guiding principle in formulating rules for enumeration (who should be counted) and residence (where they should be counted) since the first census in 1790. It provides that persons generally should be included in the census counts at the place where they live and sleep most of the time as of the census date. Stip. ¶¶ 4, 5 (J.A. 173-174). At the same time, the first Census Act recognized that persons "occasionally absent at the time of the enumeration" from their usual residence in the United States should nevertheless be returned "as belonging to that place," rather than their actual physical location on the census date. Act of Mar. 1, 1790, ch. 2, § 5, 1 Stat. 103 (quoted

at J.S. App. 59a); see page 35, *infra*. From the earliest censuses, officials have developed rules for determining where people "belong" for purposes of the census when they are temporarily away from what might be considered a usual residence on census day. See, *e.g.*, Bureau of the Census, *200 Years of Census Taking* 22 (1989) (1850 instruction specifying that "[a]nyone who is temporarily absent on a journey, or for other purposes, without taking up his place of residence elsewhere, and with the intention of returning again, is to be considered a member of the family which the assistant marshal is enumerating"). In particular, the Census Bureau from time to time has developed rules for applying, modifying, or departing from the "usual residence" principle for certain classes of individuals, including, for example, college and boarding school students, seafarers, Members of Congress, and—of direct pertinence here—federal military and civilian personnel serving abroad, as well as other Americans abroad.[1]

[1] See J.S. App. 60a-62a n.24; Stip. ¶ 23 (J.A. 178) (boarding school students counted at parents' home, even if living and sleeping at school); Stip. ¶ 22 (J.A. 178) (college students counted at parents' home 1900-1940, at college 1950 and after); Stip. ¶ 10 (J.A. 175) (1900 instructions to count family members serving in military at family home, even if living and sleeping abroad); Stip. ¶ 28 (J.A. 179-180) (military personnel serving abroad allocated to home of record in United States in 1970); J.A. 107 (Members of Congress may be counted at home district, even if living and sleeping most of the time in District of Columbia vicinity); J.S. App. 61a n.24; J.A. 220-222 (crew of merchant vessel traditionally counted at port where ship is berthed, at port of destination if in U.S. territory, or at home port if vessel is in territorial waters but headed overseas); J.A. 222 (crew of canneries, freezer ships, and tuna ships may claim a usual residence on shore, even though at sea for several months); C.D. Wright and W.C. Hunt, *History and Growth of the Census: 1790-1890*, at 157, 171, 186 (1900) (1870, 1880 and 1890 instructions providing that "seafaring men are to be reported at their land home, no matter how long they may have been absent, if they are supposed to be alive"); Dep't of the Interior, Census Office, *Instructions to Enumerators for Twelfth Census* ¶ 112 (1900) (same); Dep't of Commerce & Labor, Bureau of the Census, *Instructions to Enumerators for Thirteenth Decennial Census* ¶ 62 (1910) (same); *id.* ¶ 64 (U.S. citizen abroad who is member of family in district should be enumerated as of district; "[i]t does not matter how long the absence abroad is continued, provided the person intends to return to the United States"); U.S. Dep't of Commerce, Bureau of the Census, *Instructions to Enumerators for Fourteenth Decennial Census* ¶¶ 61, 63 (1919) (same for seafarers and citizens abroad); U.S. Dep't of Commerce, Bureau of the Census, *Instructions to Enumerators for Fifteenth Census* ¶ 78 (1930) (same for citizens abroad); U.S. Dep't of Commerce, Bureau of the Census, *Instructions to Enumerators for Sixteenth Decennial Census* ¶ 330 (1940) (same).

Military personnel serving outside the States were first included in the Nation's total population in 1830 and 1840, although their numbers were not allocated to particular States for purposes of apportionment of Representatives. The counting was then discontinued, but was reinstated in 1900, when significant numbers of servicemen were abroad as a result of the Spanish-American War. See 41 Op. Att'y Gen. 31, 34 (1949). Although the count of servicemen stationed abroad was not allocated to particular States, instructions to enumerators for use in the United States in 1900 specified that "[i]f a soldier, sailor, or marine (officer or enlisted man), or civilian employee in the service of the United States at a station at home *or abroad*, is a member of a family living in your district, he should be enumerated as a member of that family, even though he may be absent on duty at the time of the enumeration." Stip. ¶ 10 (J.A. 175) (emphasis added). From 1910 through 1960, military personnel serving abroad were included in the Nation's population, but that count was not allocated to particular States. Stip. ¶ 18 (J.A. 177).

In the 1970 census, the Department of Commerce decided to include overseas military personnel in state population totals for apportionment purposes, primarily using "home of record" data furnished by the Department of Defense. *Borough of Bethel Park* v. *Stans*, 449 F.2d 575, 581 (3d Cir. 1971). A person designates a "home of record" when enlisting in one of the military services, See DD Form 1966, Box . Instructions for completing the enlistment form state that the "home of record" is the

address "declared by you to be your permanent home or actual home at time of enlistment," and not a "temporary address."[2] "Home of record" "reflect[s] the State to which [an enlistee] will be moved upon separation."[3]

The Commerce Department decided to include overseas military personnel (and their dependents) in state totals in 1970 because of the large number serving abroad during the Vietnam conflict and strong bipartisan congressional support for doing so, *1976 Hearing* 7-9 (A.R. 41-43). The Commerce Department also relied on a 1969 opinion by then-Assistant Attorney General Rehnquist, who concluded that "the Director of the Census may, in his discretion, validly adopt that procedure." A.R. 14-15 (J.A. 46-47). Assistant Attorney General Rehnquist stated his understanding that the factors that led to the Director's former practice—namely, difficulties in securing reliable information and the substantial expense of allocation—had become "largely inapplicable," and that "it has become entirely feasible to make the proposed allocation to home States." A.R. 15 (J.A. 47). He also found it "reasonable to assume that many, if not most, persons of voting age living abroad vote in their home States and consider themselves to be represented in Congress by members from their home States." *Ibid.* As a result of including federal personnel stationed abroad (and their dependents), Oklahoma was apportioned one more Representative and Connecticut one less than each otherwise would have received. Stip. ¶ 28 (J.A. 179).

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[2] DD Form 1966 and the accompanying instruction were appended as Exhibit 3 to appellants' motion for reconsideration in the district court.

[3] Congressional Research Service, *The 1990 Census: Including Foreign-Based Military and Civilian Personnel in the State Counts* 4 (June 20, 1990) [quoting Defense Management Data Center procedures) (Administrative Record (A.R.) 878 (J.A. 149)). Some civilian employees were counted in 1970 as well. See generally *Census—Place of Residence: Hearing Before the Subcomm. on Census and Population of the House Comm. on Post Office and Civil Service*, 94th Cong., 2d Sess. 8-9 & n.1 (1976) (statement of Robert L. Hagan, Deputy Director, Bureau of the Census) (reproduced at A.R. 42-43 (J.A. 57-59)) [hereinafter *1976 Hearings*].

In the 1980 census, the Commerce Department again counted military personnel abroad and included them in the total population of the Nation. It did not, however, include them in the tabulation of state populations for apportionment purposes, because of the smaller size of the overseas population, the practice prior to 1970 of not allocating the overseas personnel count among the States, "extra costs and complexities," the "minimal (if any) impact" on apportionment, and concerns that "[t]he data on 'home State' of those overseas are of an unknown reliability," because of the Census Bureau's belief at the time that some members of the Armed Forces may select as a "home State" one with low or no income taxes, rather than a "true" home State (but see note 28, *infra*). *1976 Hearing* 9 (A.R. 43; J.A. 61-62).

3. The Commerce Department likewise did not originally plan to include federal military and civilian personnel stationed abroad (and their dependents) in the state apportionment counts following the 1990 census. However, as with the 1970 census, there was strong bipartisan support in Congress for doing so; indeed, a number of bills had been introduced to mandate that result. Stip. ¶¶ 33, 37 (J.A. 180-182). One such bill was H.R. 4720, 100th Cong., 2d Sess., which specified that the place of residence for census purposes "shall be considered to be the individual's last place of general abode within the United States for a period of 6 consecutive months or longer." A.R. 363-364. The bill was reported favorably by the House Committee, which expressed the view that "[e]xcluding them from the State population totals denies these individuals who are serving their Government the right to full and fair representation in Congress." H.R. Rep. No. 953, 100th Cong., 2d Sess. 4 (1988) (A.R. 416). The House, however, voted not to suspend the rules to permit passage. Stip. ¶ 33 (J.A. 181). The floor debates showed a broad consensus in favor of including overseas personnel in the apportionment counts; the debates centered on the manner in which they would be allocated among the States. See 134 Cong. Rec. 25,798-25,804

(1988). Some Members expressed the view that the home State should be based on an individual's "home of record," rather than his last abode of six months, *id.* at 25,799-25,800 (Reps. Ridge and Goodling), noting that the latter test "would drastically skew the census toward those few States with a large number of military bases." *Id.* at 25,801 (Rep. Kennelly); see also *id.* at 25,803 (Rep. Green); *id.* at 25,804 (Rep. Petri).

On July 31, 1989, the Secretary of Commerce decided to count personnel abroad for apportionment purposes in 1990. A.R. 511-512 (J.A. 120-122). The Secretary noted that the Defense Department "believes strongly that its employees should not be excluded from the apportionment counts because of temporary and involuntary residence overseas," and that "[m]any, if not most, of these military overseas consider themselves to be usual residents of the United States, even though they are temporarily assigned overseas." A.R. 511 (J.A. 120). He also relied on the growing bipartisan concern of Congress; the Defense Department's assurance that it was feasible to provide the necessary data in time to meet the December 31, 1990 deadline for reporting to the President; the precedent of including overseas military personnel in 1970; and Assistant Attorney General Rehnquist's 1969 opinion that the Department enjoyed the discretion to do so. A.R. 511-512 (J.A. 120-122).

4. At the time the Secretary decided to include overseas personnel, the Commerce Department planned to use data derived from an enumeration of overseas personnel that the Defense Department had previously decided to conduct. Due to a lack of funding and other constraints, however, the Defense Department abandoned that option in December 1989. Stip. ¶ 46 (J.A. 184; A.R. 787). Attention then turned to alternative approaches based on existing Defense Department data.

At the same time, congressional support for use of "home of record" data intensified. For example, in a letter dated April 5, 1990, four Members of Congress urged the Director of the Census Bureau to adopt the "home of record" method (A.R. 811-812 (J.A. 129)):

> The only administrative listing which would best describe the residence of our members of the armed forces stationed abroad is the home of record. After all, the state listed for the home of record is the last location at which the members of the armed forces *CHOSE* TO RESIDE. In a very real sense, those states had this population taken from them by federal action.

On May 23, 1990, two bills were introduced to require the Census Bureau to assign members of the military stationed abroad to home States using their "homes of record." H.R. 4903 and S. 2675, 101st Cong., 2d Sess. The House Report on the former expressed the view that members of the Armed Forces and their dependents stationed overseas "are entitled to representation in Congress and should be included in the population figures used for apportionment of the House of Representatives," and recommended counting them on the basis of their homes of record because that information "most closely approximates the home State of individuals who are highly mobile, not by choice, but by virtue of their service to their country." H.R. Rep. No. 552, 101st Cong., 2d Sess. 3 (1990). The House passed H.R. 4903 on June 26, 1990. 136 Cong. Rec. H4195-H4197 (daily ed.). The companion Senate bill was scheduled for committee consideration in the near future. A.R. 862, 863, 919.

In this context, the Census Bureau reviewed the three methods for allocating overseas military personnel among the States based on data in existing Defense Department records: home of record, legal residence, and last duty station in the United States. A.R. 921 (J.A. 162).[4]

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[4] For a time after the Defense Department cancelled its enumeration, it believed that it could furnish to the Census Bureau information on service members' last residence of six months in the United States, although the Census Bureau expressed its willingness to utilize "home of record" data instead if the Defense Department reexamined available evidence and furnished an acceptable methodology by October 31, 1990. A.R. 745 (J.A. 137). The Defense Department subsequently determined that it did not have the capac-

After doing so, the Associate Director of the Bureau in charge of the Decennial Census recommended use of home of record, because in view of all the currently available information, "the technical staff of the Census Bureau believes that the Home of Record comes closest to the concept of the Usual Residence among the three data sources that DoD has available." A.R. 924 (J.A. 164).

The Under Secretary agreed with the Census Bureau and recommended that the Secretary adopt the "home of record" method, A.R. 919 (J.A. 158), concluding that home of record data "will constitute the most accurate data available from the Department of Defense." A.R. 919 (J.A. 158). By contrast, the Under Secretary explained that "because last duty station merely reflects the location of the facility to which a person is assigned, many military personnel and their dependents would be counted in states other than their actual previous U.S. residence (such as those assigned to the Pentagon, who would be counted as D.C. residents even though they lived in Maryland or Virginia)." A.R. 921 (J.A. 162). The Under Secretary also explained that the option of using a service member's legal residence was rejected because in many cases legal residence—which is declared by a member of the Armed Forces for tax purposes (*CRS Study* 4 (A.R. 878; J.A. 149))—does not necessarily reflect a substantial nexus to the State. A.R. 921 (J.A. 163); see also A.R. 932 (J.A. 168).

The Under Secretary communicated the Department's reasoning in letters to Members of Congress on July 23 and September 11, 1990. A.R. 925-942 (J.A. 165-169). He also noted that although approximately 7% of overseas personnel records lacked a home of record designation, the Defense Manpower Data Center planned to "use supplemental data from their automated records" to fill the gap and that, as a result, "the number of missing

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ity to assemble data on the last residence of its personnel in the United States of six months' duration. A.R. 919 (J.A. 158).

state designations will be negligible." See A.R. 931 (J.A. 167).[5]

5. On May 1, 1991, appellees filed this suit in an effort to retain Massachusetts' eleventh Representative. They challenged, *inter alia*, the inclusion of federal personnel stationed abroad in the population totals used for apportioning Representatives among the States.[6]

a. The district court rejected appellees' contention that because Section 2 of the Fourteenth Amendment refers to a counting of persons "in each State," inclusion of federal personnel stationed abroad violates the Constitution. J.S. App. 79a-81a. The court explained that the "in each State" language refers to "actual inhabitants of a state, that is, persons with some relation to the state—not simply those physically present in the state on census day," and it found "no indication that the members of the Constitutional Convention had in mind any specific criteria by which persons were to be deemed residents of one state rather than another." J.S. App. 80a (quoting *Borough of Bethel Park* v. *Stans*, 319 F. Supp. 971, 974 (W.D. Pa. 1970)). The court pointed out that in addition to military personnel, other subclasses of per-

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[5] Under the approach ultimately adopted, if the Defense Department did not have a home of record for a member, his home State (and that of his dependents) was determined on the basis of his legal residence, with last duty station being used if legal residence also was not available. Stip. ¶ 56 (J.A. 186). The home States of Defense Department civilian employees (and their dependents) were determined through a combination of administrative records and responses to a short questionnaire. A.R. 944 (J.A. 171). The home States of overseas employees of other federal agencies (and their dependents) were based on the agencies' responses, drawn from data in their records, on a form provided by the Census Bureau. Stip. ¶ 57 (J.A. 187).

[6] Appellees also challenged the equal proportions method prescribed by 2 U.S.C. 2a for apportioning Representatives among the States. The district court rejected that challenge. J.S. App. 27a-56a. On March 30, 1992, appellees filed a jurisdictional statement to docket a cross-appeal from that portion of the judgment below. The Court has since sustained the constitutionality of 2 U.S.C. 2a. *United States Dep't of Commerce* v. *Montana*, No. 91-860 (Mar. 31, 1992).

sons (such as boarding school and college students, other Americans abroad, and crew members of vessels at sea) also present the problem of how to account for people who are away from what might be considered their domicile or legal residence on the census date. The court noted that "[c]ensus administrators have developed various methods for dealing with the[se] subclasses"—methods that "have reflected contemporary societal views about what location should be designated as the 'usual residence' for such a person and the administrative practicability and accuracy of making a count of a member of the subclass at a particular location." J.S. App. 61a n.24. In the court's view, this "flexibility of the 'usual residence' concept as applied by the Census Bureau over the years * * * demonstrates the broad discretion the Bureau has traditionally enjoyed to interpret what the phrase 'in each state' means." *Id.* at 81a.

b. The court likewise rejected appellees' contention that inclusion of federal personnel stationed abroad in state population totals violates the Census Act. J.S. App. 81a n.31. It noted that 13 U.S.C. 141(a) "gives the Secretary broad discretion to determine how the census will be carried out, discretion which mirrors the broad mandate given to Congress" by Article I, Section 2, Clause 3. J.S. App. 81a n.31. Here, the court concluded, "[t]he policy decision to apportion overseas federal employees is well within the discretion afforded the Census Bureau under the Census Act." *Ibid.*

c. Invoking the APA, however, the district court invalidated the Secretary's determination to include federal personnel abroad in the 1990 apportionment counts. As a threshold matter, the court rejected appellants' position that the Secretary's determination to count overseas personnel on the basis of their homes of record and comparable data is not subject to judicial review under the APA because that matter is "committed to agency discretion by law." 5 U.S.C. 701(a)(2). It recognized that 13 U.S.C. 141(a), by providing for the Secretary to conduct the census "in such form and content as he may determine,"

"is plainly drawn in discretionary terms" and "'fairly exudes deference.'" J.S. App. 70a (quoting *Webster* v. *Doe*, 486 U.S. 592, 600 (1988)). But, observing that the census "can be profoundly influential in the balance of advantage among competing partisan and parochial interests," the court found it "especially appropriate to have some review by the courts, as the disinterested branch of government." J.S. App. 71a. The court believed that the "usual residence" policy furnished adequate standards for judicial review here. *Id.* at 70a, 71a.

Reaching the merits, the court condemned the Secretary's manner of including federal personnel abroad as arbitrary and capricious. J.S. App. 75a-79a. The court surmised that the Secretary decided in July 1989 to include overseas personnel only because the Defense Department planned to conduct a special enumeration that was expected to generate reliable data. The court stated that if the Secretary's decisionmaking were complete at that time, it "would not be prepared to say that his decision was arbitrary and capricious." *Id.* at 76a. But the court faulted the Census Bureau for proceeding to include federal personnel abroad after the Defense Department cancelled its plans for the enumeration. *Id.* at 76a-79a.

d. Rather than remanding the matter to the Secretary for further proceedings, the court ordered the Executive Branch defendants, by March 31, 1992, to submit to the Clerk of the House of Representatives a statement showing the number of Representatives to which each State would be entitled without inclusion of personnel abroad in the state apportionment counts. The court further ordered the Clerk of the House of Representatives, by April 10, 1992, to send to the Governor of each State a recertification of the number of Representatives to which it is entitled under the district court's decision. J.S. App. 95a. The district court's judgment, if allowed to stand, will result in the loss of one Representative by the State of Washington and a gain of one by Massachusetts. Stip. ¶ 42 (J.A. 183). On March 27, 1992, this Court granted a stay of the district court's judgment pending disposition of this appeal.

SUMMARY OF ARGUMENT

I. The apportionment of Representatives, and the underlying census on which it is based, are not subject to judicial review under the Administrative Procedure Act.

A. Judicial review is unavailable because the conduct of the census is "committed to agency discretion by law." 5 U.S.C. 701(a)(2). The Census Act provides that the Secretary shall conduct the census "in such form and content as he may determine." 13 U.S.C. 141(a). This language contains no standards against which to assess the Secretary's actions. Indeed, the language is at least as deferential as the statutory language found to bar review in *Webster* v. *Doe*, 486 U.S. 592 (1988). The broad statutory text mirrors the Census Clause of the Constitution, which provides for the census to be taken "in such Manner as they [the Congress] shall by Law direct." If Congress itself had mandated inclusion of federal personnel abroad based on home of record or comparable data, the Constitution would furnish no basis for a court to review that decision. The result should be no different here, where the Secretary made the same decision under an equally broad grant of authority. Moreover, the tradition since 1790 has been that the conduct of the census is committed to the Executive Branch, subject to oversight only by Congress. Practical considerations compel that conclusion as well, in light of (i) the myriad technical and policy judgments the census entails, (ii) the need to balance cost and feasibility, and (iii) the substantial disruptive consequences of allowing numerous and often competing judicial challenges to census results.

B. The relevant statutes also "preclude judicial review" under the APA. 5 U.S.C. 701(a)(1). The Census Act requires the Secretary to report state population totals to the President within nine months of the census date. 13 U.S.C. 141(b). The internal nature of that communication, from a cabinet member to the President, suggests no role for the courts, and the bare list of state populations scarcely furnishes a basis for judicial review of the vast census undertaking that produced those figures. Furthermore, the Secretary's report (which appellees challenge) has no operative effect; under the Apportionment Act, it is the President's statement to Congress that determines the number of Representatives to which each State is entitled. The President's statement is not a proper subject of judicial review under the APA, because the President is not an "agency" for APA purposes, and because Congress reserved to itself the role of reviewing and (if necessary) revising the apportionment based on the census. Judicial review also conflicts with the Apportionment Act's strict deadlines for the Secretary's report to the President, the President's statement to Congress, and the Clerk's certifications to the States, which are designed to assure the States a prompt opportunity to enact redistricting laws.

II. Even if judicial review is available, the district court erred in setting aside the Secretary's report of state population totals because federal personnel abroad were included based on their "homes of record" or comparable data. The district court itself properly rejected appellees' contentions that the Constitution and the Census Act permit counting only those people physically present on the census date, and therefore prohibit inclusion of federal military and civilian personnel serving their country abroad. The constitutional debates, the first census act, and the long history of census-taking since that time confirm that persons absent on the census date—even for an extended period—may properly be counted at their usual place of residence in the United States. Against that background, it was entirely appropriate for the Secretary to include overseas federal personnel in the 1990 decennial census—especially in light of the facts that such personnel vote and pay taxes, and are temporarily and (in the case of the military) involuntarily away from home in the service of their country.

Contrary to the district court's belief, it was not arbitrary and capricious for the Secretary to rely on service members' "homes of record" or comparable data as a basis for including them in the populations of the states. Even courts that have reviewed the Secretary's actions have

recognized that he has exceedingly wide latitude in selecting the *methods* for conducting the census. Here, the Census Bureau concluded that of the three available methods of allocation in existing Defense Department records, "home of record" best comported with the "usual residence" policy. The Census Bureau also found that the data to be furnished by the Defense Department were accurate for apportionment purposes. Finally, the Census Bureau found that the other available methods—legal residence or last duty station in the United States—were flawed by comparison.

III. In any event, the district court's extraordinary remedy—an injunction requiring new census tabulations and a reapportionment of the House of Representatives—was improper. Even in an ordinary APA case, the proper disposition is to remand to the agency for further consideration. The lower court's failure to follow that course here is particularly troublesome, because the relief it ordered both intrudes deeply into matters textually committed to the political Branches and disrupts time-sensitive redistricting by the States.

ARGUMENT

I. THE APPORTIONMENT OF REPRESENTATIVES, AND THE CENSUS ON WHICH IT IS BASED, ARE NOT SUBJECT TO JUDICIAL REVIEW UNDER THE ADMINISTRATIVE PROCEDURE ACT

The district court rejected appellees' contentions that inclusion of federal military and civilian personnel (and their dependents) abroad in the state population totals used for apportionment of Representatives violates the Constitution and the Census Act. J.S. App. 79a-81a & n.31. The court nevertheless invalidated the 1990 census totals for the States and the apportionment of Representatives based on those totals, finding that the *method* chosen by the Secretary to include overseas personnel in state population totals violated the Administrative Procedure Act.

The court had no authority to second-guess the details of the conduct of the census in this fashion, because appellees have no right to obtain judicial review of either (1) the report of state population totals by the Secretary of Commerce to the President pursuant to 13 U.S.C. 141(b), or (2) the apportionment of Representatives among the States made in the statement submitted by the President to Congress pursuant to 2 U.S.C. 2a. The apportionment of Representatives—and the census on which it is based—are matters of state that Congress has assigned to the Executive Branch, subject to review and (if necessary) revision only by Congress itself.

Congress has not chosen to involve the courts in that process. This conclusion is evident from the constitutional and statutory framework of the census, which expressly commits the conduct of the census and the apportionment of Representatives to the sound judgment and discretion of Congress and the Executive Branch and establishes deadlines that allow no room for judicial review. It also is evident from the very nature of an undertaking as vast and complex as the enumeration (and allocation among the States) of a national population that now totals more than 250 million people. The resulting census figures represent not only the sums of the persons counted, but also the sums of millions of individual decisions by approximately 200,000 enumerators and other Census Bureau personnel as well as the people being counted. Congress did not intend for the courts to review and set aside the census totals (much less the apportionment of Representatives) by entertaining challenges to the myriad separate judgment calls that must be made in assembling the data that produce those totals. In APA terms, this is a situation in which the challenged agency action is "committed to agency discretion by law" and in which the relevant "statutes preclude judicial review." 5 U.S.C. 701(a).

A. The Secretary's Compilation And Report To The President Of State Census Totals That Include Federal Personnel And Their Dependents Stationed Abroad Is "Committed To Agency Discretion By Law"

Agency action is committed to agency discretion by law where " 'statutes are drawn in such broad terms that in a given case there is no law to apply,' " *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 410 (1971) (quoting S. Rep. No. 752, 79th Cong., 1st Sess. 26 (1945))—*i.e.*, " 'if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.' " *Webster* v. *Doe*, 486 U.S. 592, 600 (1988) (quoting *Heckler* v. *Chaney*, 470 U.S. 821, 830 (1985)). The Senate Report quoted in *Overton Park* further indicates that the agency discretion exception applies in other circumstances as well, since it refers to the situation in which there is "no law to apply" as an "example" of the category of cases covered by the exception. S. Rep. No. 752, *supra*, at 26. See *Webster*, 486 U.S. at 608 (Scalia, J., dissenting); *id.* at 605 (O'Connor, J., concurring in part and dissenting in part). Thus, the "APA did not significantly alter the 'common law' of judicial review of agency action" that had developed prior to its enactment. *Chaney*, 470 U.S. at 832.

Application of the exception requires consideration of the relevant statutory text and structure, *Webster*, 486 U.S. at 600-601; *Southern Ry.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444, 455 (1979); whether the matter traditionally has been viewed as committed to agency discretion, *ICC* v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270, 282 (1987); *Chaney*, 470 U.S. at 831; whether the challenged action manifests a "general unsuitability" for judicial review because it involves a "complicated balancing of a number of factors," difficult judgments concerning the allocation of scarce administrative resources, or matters uniquely committed to another Branch, *Chaney*, 470 U.S. at 831-832; and whether judicial review would produce "disruptive practical consequences," *Seaboard Allied Milling*, 442 U.S. at 457. These factors compel the conclusion here that the Secretary's inclusion of federal personnel abroad in state population counts based on their homes of record or comparable data is—like the conduct of the census generally—committed to the discretion of the Secretary.

1. In the first place, the applicable statute, 13 U.S.C. 141(a), contains no standards against which to assess the Secretary's exercise of discretion. Far from confining the Secretary's discretion, the statute confirms it in the broadest possible terms: the census is to be conducted "in such form and content as he may determine." 13 U.S.C. 141(a). This plain language is at least as deferential as that at issue in *Webster*. That case involved a statute which, as the Court explained (486 U.S. at 600)

> allows termination of an Agency employee whenever the Director "shall *deem* such termination necessary or advisable in the interests of the United States" (emphasis added), not simply when the dismissal *is* necessary or advisable to those interests. This standard fairly exudes deference to the Director, and appears to us to foreclose the application of any meaningful judicial standard of review.

The language of 13 U.S.C. 141(a) has a similar "deeming" element—the census is to be conducted as the Secretary "may determine." Moreover, the census statute, unlike the statute at issue in *Webster*, is entirely open-ended. While termination of employment in *Webster* was authorized whenever the Director deemed certain conditions to exist, the Secretary's discretion here is not even cabined to that extent. He is simply to "take a decennial census * * * in such form and content as he may determine."

As Judge Posner noted in the Seventh Circuit's recent decision in *Tucker* v. *United States Dep't of Commerce*, No. 91-2051 (Mar. 16, 1992), the census statute "say[s] nothing about *how* to conduct a census * * *. So nondirective [is] the relevant statute[] that it is arguable that there is no law for a court to apply in a case like

this." Slip op. 12 (emphasis added). Judge Ripple, concurring in the judgment, was more definitive: in his view, to the extent the plaintiffs sought to obtain judicial review of the Secretary's determination not to make a statistical adjustment of the census counts, "the plain language of the governing statute makes it clear that the matter is commited to agency discretion. There is 'no law to apply.'" Slip op. 16 (citation omitted).[7]

Although the district court agreed that 13 U.S.C. 141 (a) "is plainly drawn in discretionary terms" and that—standing alone—it "fairly exudes deference," J.S. App. 70a (quoting *Webster*, 486 U.S. at 600), it found that the statutory structure "has been refined further by the 'usual residence' policy that has governed census determinations since the First Census Act." J.S. App. 70a. The "usual residence" policy, however, does not provide law to apply in this case. The reason is that, like Congress itself in the first Census Act, the Secretary, in his discretion, has modified or departed from that policy from time to time throughout history—for example, with respect to seafarers in the 1870-1920 instructions; family members serving in the military overseas in the 1900 instructions; Americans abroad but not employed by the federal government in the instructions for 1910 through 1940; all military personnel abroad in the 1970 and 1990 censuses; boarding school students; college students from 1900-1940; certain merchant vessel crews currently; and Members of Congress. See pages 3-5 & n.1, *supra*. In short, the usual residence policy applies, except when—for a variety of reasons—it does not apply.

The question in this case is whether a court may review the Secretary's decision to modify or depart from that policy by including government personnel abroad (and their dependents) in state apportionment counts. The policy itself can provide no guidance in answering

[7] The *Tucker* majority rested its decision on a holding that the pertinent provisions did not authorize judicial review because they did not confer litigable rights. Slip. op. 11.

that question.[8] Holding the Secretary's exercise of discretion in modifying or departing *from* the usual residence policy to the litmus test *of* the usual residence policy makes no sense. The absence of any reference to the usual residence principle in the statutory text underscores that articulation and application of that principle, and the nature of the factual bases on which it may be invoked or modified in particular circumstances, are committed to the Secretary's discretion.

2. The constitutional basis for the census strongly reinforces the conclusion that its conduct is committed to agency discretion within the meaning of the APA. We do not contend that the conduct of the census presents a non-justiciable political question in the constitutional sense. Cf. *Montana*, slip op. 14-17. But the unbridled breadth of delegation of authority in the relevant constitutional and statutory texts nevertheless strongly suggests that the court below erred—and erred seriously—in invalidating the census totals and reapportioning the House of Representatives on the basis of its second-guessing of the Secretary's discretionary judgments.

Article I, Section 2, Clause 3 of the Constitution provides that the census shall be conducted "in such Manner as they [the Congress] shall by Law direct." By virtue of this language, "responsibility for conducting the decennial census rests with Congress." *Baldrige* v. *Shapiro*, 455 U.S. 345, 347-348 (1982). Nothing in the quoted text limits the "Manner" in which Congress may direct that the census be conducted. Certainly nothing in the constitutional text addresses the issue in this case: selection of appropriate criteria for allocating federal personnel abroad among the States. Indeed, as the district court pointed out, methods for counting various subclasses of people who may be away from what might be

[8] See *Arizona Power Auth.* v. *Morton*, 549 F.2d 1231, 1239 (9th Cir.) (Wallace, J.) ("In deciding whether agency action is committed to agency discretion by law, it is not significant that there may be law, in the abstract, that could possibly be applied. * * * Instead, we must determine whether in this particular case there is any specific law to apply."), cert. denied, 434 U.S. 835 (1977).

regarded as their domicile or legal residence on the census date "have reflected contemporary societal values" and the "administrative practicability and accuracy of making a count of a member of a subclass at a particular location" (J.S. App. 60a-61a n.24)—judgments that are beyond the expertise of a court to make. Accordingly, if Congress itself had "direct[ed]" that the "actual Enumeration" of federal personnel stationed overseas be made "in such Manner" as to include them in state populations based on their home of record or comparable data, the Constitution would furnish no basis for a court to review and set aside that legislative judgment.

There is no basis for a different result here simply because the determination was made by the Secretary of Commerce, rather than by Congress itself. Congress has directed the Secretary to take the decennial census "in such form and content as he may determine." 13 U.S.C. 141(a). As the district court itself correctly observed, this language "gives the Secretary broad discretion to determine how the census will be carried out, discretion which mirrors the broad mandate given to Congress" under Article I, Section 2, Clause 3. J.S. App. 81a n.31.

The Seventh Circuit, in *Tucker*, relied upon the broad language of Article I, Section 2, Clause 3—as well as that of the census and apportionment statutes implementing that Clause—in holding that those provisions do not authorize suits for judicial review of allegedly inaccurate census determinations. The court noted (slip op. 12):

> It might be different if the apportionment clause, the census statutes, or the Administrative Procedure Act contained guidelines for an accurate decennial census, for that would be some evidence that the framers of these various enactments had been trying to create a judicially administrable standard. There is nothing of that sort, and the inference is that these enactments do not create justiciable rights.

The claim in *Tucker* was that certain groups were undercounted in the 1990 census, but the court's reasoning from the textual materials applies with equal force in

the present context. Indeed, the *Tucker* court expressly noted its "doubts about the provenance and the practicability of the right enforced" in this case. *Id.* at 13.

3. The long history of decennial censuses and apportionments since the Constitution was ratified establishes a tradition of commitment of the conduct of the census to the discretion of the Secretary, subject to oversight only by Congress. Compare *Brotherhood of Locomotive Engineers*, 482 U.S. at 282; *Chaney*, 470 U.S. at 831. Indeed, it does not appear that any substantial judicial challenges to the census were brought until 1970, some 180 years after the first census act was passed—and 25 years after enactment of the APA.[9] There are three reported cases rejecting challenges to various aspects of the 1970 census—finding in each case that the particular action was rational or not arbitrary and capricious—but none discussed the applicability of the APA's exceptions to the general grant of judicial review.[10] In connection with the 1980 census, more than *fifty* cases were brought. In a number of those cases, the courts held that the conduct of the census is not committed to agency discretion within the meaning of the APA. J.S. App. 68a. However, in none of those cases did the court undertake a discerning analysis of the statutory text, constitutional backdrop, historical tradition, or the practical considerations (discussed at pages 24-27, *infra*) that weigh heavily against judicial review. Moreover, most of those decisions preceded this Court's decisions in *Chaney*, *Brotherhood of Locomotive Engineers*, and *Webster*, which underscored the relevance of these factors. And, finally, in none of

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[9] In *United States* v. *Steuart*, 47 F.2d 979 (D.C. Cir. 1931), the court affirmed a denial of mandamus relief to the City of Atlanta, which sought to compel the Census Bureau, in its official publications, to report the total population for metropolitan Atlanta as if it were a single city. The case, however, did not involve any challenge to the population totals themselves.

[10] See *Quon* v. *Stans*, 309 F. Supp. 604 (N.D. Cal. 1970); *West End Neighborhood Corp.* v. *Stans*, 312 F. Supp. 1066 (D.D.C. 1970); *Borough of Bethel Park* v. *Stans*, 319 F. Supp. 971 (W.D. Pa. 1970), aff'd, 449 F.2d 575 (3d Cir. 1971).

the cases challenging the 1980 census did the plaintiffs ultimately prevail. Thus, even in 1980, the census was, in the end, free of judicial alteration—as it historically has been.

4. Practical considerations also strongly support the conclusion that the conduct of the census is committed to agency discretion. Administration of the census requires myriad decisions about such matters as the feasible and most efficient ways of counting particular persons or categories of persons with an acceptable degree of accuracy (face-to-face interviews, telephone calls, questionnaires to be mailed back, contacts with neighbors, or use of existing records); the need for or feasibility of follow-up procedures and other quality control measures; which persons should be included in which households; and various issues concerning *where* a person should be enumerated, including how to account for people who are away from what might appear to be a usual residence in the United States—for a brief or extended period, and either inside or outside the United States.

Decisions to include or exclude certain categories of people at one location or another based on judgments about the accuracy of a count of a category pose particular policy dilemmas. The Secretary may in his discretion fix an acceptable error rate at a higher level in particular circumstances—depending on the feasibility of alternative methods of counting and the desirability of including the particular category in the apportionment counts. In making these judgments, cost is always a factor that needs to be weighed in the balance. Information that people may inhabit a remote Alaskan island in the Arctic Sea that is inaccessible to enumerators except at the cost of mounting a polar expedition may not justify efforts to find and count those people, even though Alaska might end up losing an additional Representative by one person. The census is conducted on a limited budget, and resources devoted to increasing the accuracy of the count of one particular category of persons are necessarily diverted from other enumeration tasks. Cf. *Mathews* v. *Eldridge*, 424 U.S. 319, 348-349 (1976).

Resolution of these and other issues requires a "complicated balancing of a number of factors" and renders the legislative-type fact-finding that is the census "general[ly] unsuitab[le]" for judicial review. *Chaney*, 470 U.S. at 831-832; see also *Panama Canal Co.* v. *Grace Lines, Inc.*, 356 U.S. 309, 317 (1958) (citation omitted) (matters committed to agency discretion because they are ones "on which experts disagree; they involve nice issues of judgment and choice"). As the district court observed in *City of Philadelphia* v. *Klutznick*, 503 F. Supp. 663, 676 (E.D. Pa. 1980), "[t]he accuracy of various statistics is often the focus of biased, heated and complex argument," and "[i]n the execution of the census, these disputes are best resolved not by the courts but by the Bureau itself, whose experience with prior censuses and expertise in the collection and analysis of statistical information render it especially qualified to make the appropriate decisions."[11] See *Tucker*, slip op. 12 (because relevant statutes are "nondirective," "you might as well turn [the undercount question] over to a panel of statisticians and political scientists and let them make the decision, for all that a court could do to add to its rationality or fairness").

Moreover, recognition of a right to judicial review under the APA would invite the courts to micromanage the census. It would also invite States and individuals who believe they have been shortchanged to sift through the census plan and its implementation to find just the right "defect"—namely, one whose "correction" would work to their advantage. The rash of suits following the past two censuses underscores that practical reality. Even if such suits ultimately fail, they will surely produce

[11] The *City of Philadelphia* court made these observations in support of its conclusion that, although the conduct of the census was not, in its view, unreviewable, a narrow standard of review was "particularly appropriate." 503 F. Supp. at 676. In our view, the observation quoted in the text (and that quoted below) support the conclusion that the census is entirely committed to agency discretion by law.

"disruptive practical consequences" for the Census Bureau. *Seaboard Allied Milling*, 442 U.S. at 457.

Failure to enforce the APA exception also would produce chaos, uncertainty, and competition among the States and their subdivisions and citizens resulting from politically or parochially driven lawsuits. As the *City of Philadelphia* court observed (503 F. Supp. at 677):

> [T]he Framers in their wisdom foresaw [that] the unique yet necessary and favored advantage of a federal census is the uniformity—nationwide—of its method; which, by avoiding the possibility of local bias, prevents the result from suffering the Nation's distrust. To allow local governments to gain control over the national census by applying to the courts for adjustment, recalculation, substitution and replacement of the Bureau's figures and techniques under the guise of judicial review is to sacrifice the national program to the exact dangers of local manipulation and bias, no matter how well intentioned, the Founders sought to avoid.

These considerations underscore the soundness of the conclusion that, at least in the absence of a violation of a constitutional limitation, cf. *Webster*, 486 U.S. at 603-604, the conduct of the census is committed to the discretion of a *single* agency (the Department of Commerce) having nationwide cognizance of the matter, without the intrusive and fragmenting involvement of numerous—and often competing—lawsuits reflecting a blatantly parochial perspective.

The district court, however, noted that "[t]he consequence of the census can be profoundly influential," and opined that "[i]t is especially appropriate to have some review by the courts, as the disinterested branch of government." J.S. App. 71a. Whatever their merits, such policy arguments cannot overcome Congress's determination that matters "committed to agency discretion by law" are *not* subject to judicial review under the APA, or Congress's determination in the Census Act to commit the form and manner of the census to the Secretary of Commerce. It is after all to Congress—however interested or disinterested—that the Constitution assigns responsibility for the census, and it may be precisely *because* "the consequence of the census can be profoundly influential" that Congress has not seen fit to provide a role for the judiciary in policing the conduct of the census. Instead, Congress has reserved to itself the responsibility for oversight of the Secretary's performance and correction of any perceived defects in the census and the resulting apportionment. See pages 31-32, *infra*. As the Seventh Circuit noted in *Tucker* (slip op. 4), "[i]t should go without saying that federal judges cannot provide a solvent for every social problem or a remedy for every questionable act of government," and nowhere is that more true than with respect to the technical and policy judgments surrounding a census of 250 million people.

B. The Census Act And Apportionment Act Preclude Judicial Review Of The State Population Totals Reported By The Secretary To The President And The Apportionment Of Representatives Made By The President's Statement To Congress

Congress's commitment of the conduct of the census to the discretion of the Secretary of Commerce is not the only obstacle to this suit. In addition, this is a case in which the relevant "statutes preclude judicial review." 5 U.S.C. 701(a)(1). Whether a particular statute precludes judicial review "is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." *Block* v. *Community Nutrition Institute*, 467 U.S. 340, 345 (1984); accord *Department of the Navy* v. *Egan*, 484 U.S. 518, 530 (1988); *NLRB* v. *United Food & Commercial Workers Union*, 484 U.S. 112, 131-133 (1987); see also *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297, 301 (1943) (the "type of problem involved and the history of the statute in question" are "highly relevant").[12]

[12] Under the APA, "[t]he presumption favoring judicial review of administrative action is just that—a presumption." *Community*

1. Under the APA, the only "final agency action" that could conceivably be subject to judicial review in the present context is the report that the Secretary of Commerce is required by 13 U.S.C. 141(b) to submit to the President within nine months of the census date (April 1).[13] The very nature of that report cuts strongly against the proposition that it is subject to judicial review. By statute, the report need only consist of "[t]he tabulation of total population by States * * * as required for the apportionment of Representatives in Congress among the several States," 13 U.S.C. 141(b), and the report submitted by the Secretary on December 26, 1990, in fact consisted (aside from a cover letter) only of that tabulation plus a calculation of the number of Representatives to which each State would be entitled under the method of equal proportions. A bare list of "total population by States" scarcely furnishes a basis for meaningful judicial review of those figures. There is, moreover, no suggestion in the Act that the Secretary's report must be based on or supported by particular findings, formal written decisions on various courses chosen, or an identifiable administrative record. In fact, the actual "record" of the census consists of the major part of the Census Bureau's activities over a period of several years around the census date and the countless documents and decisions those activities generate—scarcely a manageable basis for judicial review.[14]

Nutrition Institute, 467 U.S. at 341. And although the Court has observed that it may be overcome only upon a showing of "clear and convincing evidence," the Court has never applied that standard "in the strict evidentiary sense"; it is sufficient that "the congressional intent to preclude judicial review is 'fairly discernible in the statutory scheme.'" *Id.* at 350-351 (quoting *Data Processing Serv.* v. *Camp*, 397 U.S. 150, 157 (1970)).

[13] See *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 238-243 (1980); cf. *Lujan* v. *National Wildlife Federation*, 110 S. Ct. 3177, 3190 (1990).

[14] It is because of this character of the census that there was no discrete administrative "proceeding," as such, concerning the particular subsidiary determination that appellees challenge—the inclusion of federal personnel abroad. Yet the district court both

Finally, the Census Act provides that the tabulation shall be "reported by the Secretary to the President of the United States." 13 U.S.C. 141(b). It does not direct the Secretary to publish his report of the tabulations of state populations in the *Federal Register* or otherwise to the public at large; yet some formal publication would naturally be expected if Congress had intended to permit the tabulation to be judicially challenged. The internal nature of the communication, from a Member of the Cabinet to the President, suggests no basis for judicial involvement.

2. Under the governing statutory scheme, it is the action of the President, not the Secretary of Commerce, that determines the apportionment of Representatives. The Secretary's task is simply "to find the facts and then cease." *Switchmen's Union*, 320 U.S. at 305. The President, in turn, must transmit to Congress a statement showing the whole number of persons in each State and the number of Representatives to which it would be entitled under the method of equal proportions. 2 U.S.C. 2a(a). Subsection (b) of 2 U.S.C. 2a then provides that "[e]ach State shall be entitle[illegible] * to the number of Representatives shown in the [illegible]ement required by subsection (a)"—*i.e.*, the *President's* statement. The fact that the Act contemplates this additional (and operative) action by the President strongly implies that the Secretary's "report" is not a proper subject of judicial review under the APA. Cf. *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103, 110-114 (1948); *Reaves* v. *Ainsworth*, 219 U.S. 296, 306 (1911).

Nor is the President's statement to Congress a proper subject of judicial review under the APA. Indeed, as the D.C. Circuit held in *Armstrong* v. *Bush*, 924 F.2d 282 (1991), the President is not even an "agency" within the

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faulted the Secretary for not inserting in the "record" what it regarded as an adequate written explanation for those determinations and refused either to allow the Secretary to furnish a further explanation to the court or to remand the matter to the Secretary for that purpose. See J.S. App. 77a-79a, 87a-90a.

meaning of the APA.[15] The D.C. Circuit correctly reasoned that 5 U.S.C. 701(b)(1) should not be read to apply to the Chief Executive's actions, in view of the textual silence, the legislative history of the APA, the "longstanding practice" of the Executive Branch in not subjecting the President's actions to the APA's procedures, and the "compelling reasons" for requiring a "clear statement" of congressional intent where a statute would implicate separation of powers concerns. 924 F.2d at 288-289; see also *Mississippi* v. *Johnson*, 71 U.S. (4 Wall.) 475 (1866).[16]

[15] Prior decisions had not reached the issue. See *Soucie* v. *David*, 448 F.2d 1067, 1073 (D.C. Cir. 1971); *DeRieux* v. *Five Smiths, Inc.*, 499 F.2d 1321, 1332 (Temp. Emer. Ct. App.), cert. denied, 419 U.S. 896 (1974); *Johnsrud* v. *Carter*, 620 F.2d 29, 32 n.8 (3d Cir. 1980); *Senate Select Committee on Presidential Campaign Activities* v. *Nixon*, 366 F. Supp. 51, 58 & n.14 (D.D.C. 1973); *Amalgamated Meat Cutters* v. *Connally*, 337 F. Supp. 737, 761 (D.D.C. 1971) (three-judge court).

[16] See also *Kissinger* v. *Reporters Committee for Freedom of the Press*, 445 U.S. 136, 156 (1980). Furthermore, the functions of the President are separately addressed by Title 3 of the United States Code, not Title 5. The term "agency" would be a peculiar way to refer to the President in any event, since an "agency" is generally understood as being responsible to a principal. The President, of course, is not the agent of any principal, but rather is the principal—the constitutional officer in the Executive Branch to whom the agencies in that Branch are responsible.

Consistent with this view, the 1941 report of the Attorney General's Committee on Administrative Procedure distinguished the President's functions from those of the agencies to which the APA would be addressed: "Instead of being simply one means of continuous, integrated regulation, such as most of the regulatory bureaus and commissions undertake, [the President's functions] involve isolated or temporary authority to deal with emergency situations and often *the determination of high matters of State.*" *Administrative Procedure in Government Agencies*, S. Doc. No. 8, 77th Cong., 1st Sess. 100 (1941) (emphasis added). The responsibility for submitting the apportionment statement to Congress was assigned to the President for these very reasons. The bill originally provided for the Secretary of Commerce to submit that report, but objections were raised that the Secretary "should not be intrusted with the final responsibility for making so important a report to Congress." S. Rep. No. 2, 71st Cong., 1st Sess. 5 (1929). The bill

Accordingly, the APA, and the presumption of judicial review it sets forth (see 5 U.S.C. 702, 704), do not support the relief sought by appellees and granted by the district court—namely an injunction requiring submission of a new apportionment statement to Congress pursuant to 2 U.S.C. 2a.

3. The fact that the operative action by the President takes the form of a statement addressed *to* Congress suggests that any defects that may be perceived in that statement (or the census data on which it is based) are to be addressed *by* Congress, not by members of the public or the courts in suits brought against Executive Branch officers after the statement has been transmitted. That is clear from the text of 2 U.S.C. 2a(b), which provides that "[e]ach State *shall be entitled*, * * * until the taking effect of a reapportionment under this section *or subsequent statute*, to the number of Representatives shown in the [President's] statement" (emphasis added). By expressly reserving to itself the power to alter the apportionment in a "subsequent statute," Congress foreclosed the courts from setting aside the "entitlement" conferred on a State by the President's statement.

The legislative history of the 1929 Act in which Congress enacted the automatic apportionment mechanism (albeit with a layover period for Congress to act, see Act of June 18, 1929, ch. 28, § 22(b), 46 Stat. 26-27) confirms that Congress intended to reserve to itself the power to correct any defects that might be perceived in the census and to enact a different apportionment if it believed such a course warranted.[17] Congress did just that in

accordingly was revised to substitute the President, "so that this function may be served by a constitutional officer." *Ibid.* This approach was also thought to "make[] for greater permanence, which is one of the major virtues to be desired in such a statute." *Ibid.*

[17] See 71 Cong. Rec. 1850 (1929) (Sen. Swanson) (complaining that the Act deprives Congress of the right to "investigate whether it was a fair or a fraudulent census" unless "Congress exercises its right within three months."); *ibid.* (Sen. Burton) (responding that three months had been sufficient time for "investigation for fraud or otherwise."); *id.* at 1324-1325 (Sen. Swanson) (inquiring how

1941, when it adopted the method of equal proportions in 2 U.S.C. 2a. Congress not only mandated use of the equal proportions method on a prospective basis (for the 1950 census apportionment and beyond); it also mandated its use "retroactively" to the 1940 census and required the Clerk to send new certificates of entitlement to the States —which benefited Arkansas at the expense of Michigan. See Act of Nov. 15, 1941, ch. 470, §§ 1, 2(a), 55 Stat. 762, 2 U.S.C. 2a, 2b; *Montana* Gov't Reply Br. 13.[18]

4. The time limits in the Census Act likewise foreclose any opportunity for judicial review. The Secretary must submit his report to the President within nine months of the census date (*i.e.*, by December 31), and the President then must transmit his statement to Congress during the first week of the next Session of Congress, which typically commences on January 3. 2 U.S.C. 2a(a). Within fifteen days, the Clerk of the House then must send to the Governor of each State a certificate of the number of Representatives to which it is entitled. The whole purpose of this expedited schedule is to ensure that state legislatures may rely on the apportionment made by the President's statement and promptly enact redistricting legislation.[19]

"the House can detect any possibility of fraud in ample time for investigation and ascertainment."); *id.* at 1332 (Sen. Black) (arguing that the Act deprives Congress of the "right to determine whether or not [the] census is honest and true."); *id.* at 1611 (Sen. Vandenberg) (responding that "Congress has [an] entire session in which to pass its own apportionment law on any basis it wants to"); *id.* at 1851, 1857.

[18] Similarly, bills have been introduced in the current Congress to revise the census (by making a statistical adjustment for a perceived undercount). See S. 28, H.R. 90, and H.R. 2316, 102d Cong., 1st Sess. (1991).

[19] If reapportionment were delayed by judicial review, the States might lose the opportunity to redistrict in a timely manner—a fact (as evidenced by the stay papers filed in this Court) that both Massachusetts and Washington have become acutely aware of in this case. As Representative McLeod, the author of the 1940 floor amendment that reduced the layover period in Congress to 60 days, explained (86 Cong. Rec. 4370 (1940)):

> Unless the States can be informed by Congress relatively early * * * as to just what representation they are to have for the next decade, the legislatures will be deprived of the opportunity to act on redistricting measures within the statutory limitations of their sessions * * *.
>
> If the reapportionment question is left open until Congress adjourns in June, July, or August, by that time the legislatures will have finished up their work and gone home * * *.

The period between receipt of the President's statement and the Clerk's sending of certificates of entitlement to the States was further compressed to 15 days by the Act of Nov. 15, 1941, ch. 470, § 2(b), 55 Stat. 762, thereby underscoring the statutory policy of immediately freeing the States to enact redistricting legislation. It is fundamentally incompatible with these statutory "objectives," *Community Nutrition Institute*, 467 U.S. at 345, for a court (or various courts in various cases) to review and set aside the apportionment made by the President's statement *after* the Clerk has informed the States of their entitlements. And the strict time limits preclude judicial review prior to that time. *Morris* v. *Gressette*, 432 U.S. 491, 504-505 (1977) ("Since judicial review * * * would unavoidably extend [statutory] period, it is necessarily precluded"); see also *Seaboard Allied Milling*, 442 U.S. at 457. "Such review would involve lengthy judicial proceedings in precisely the area where Congress was concerned that speed of resolution was necessary." *United Food & Commercial Workers Union*, 484 U.S. at 131-132.

II. INCLUDING FEDERAL PERSONNEL ABROAD AND THEIR DEPENDENTS IN STATE POPULATION TOTALS DID NOT RENDER THE SECRETARY'S REPORT OF THOSE POPULATIONS TO THE PRESIDENT ARBITRARY AND CAPRICIOUS

Even if the matters appellees challenge are not entirely committed to the Secretary's discretion or statutorily insulated from review, the district court plainly erred on the merits in setting aside the Secretary's report of state population totals because federal personnel abroad were included in those totals based on their "homes of record" or comparable data.

A. As an initial matter, the district court correctly rejected appellees' contention that it is *unconstitutional* to include federal military and civilian personnel stationed abroad in state population counts for apportionment purposes. See J.S. App. 79a-81a. Article I, Section 2, Clause 3 of the Constitution provides for apportionment of Representatives among the States according to their "respective Numbers"—*i.e.*, "Persons"—and for an "actual Enumeration" of those numbers every ten years. Nothing in this constitutional text suggests that military and civilian personnel abroad cannot properly be regarded, in the conduct of the census, as still part of the "respective Numbers" of the States from whence they came.

The constitutional debates support this construction of the text. The Framers repeatedly referred to the census as an enumeration of "inhabitants." See 1. M. Farrand, *The Record of the Federal Convention of 1787*, at 35, 486, 585 (1966); 2 *id.* at 130, 164, 178; *The Federalist*, No. 54 (J. Madison), at 371; *id.*, No. 55 (J. Madison), at 375; *id.*, No. 58 (J. Madison), at 391-392. The meaning attached to the phrase at the time is reflected in the substitution of the term "Inhabitant" for "Resident" in the Clause stating the qualifications of Members of the House of Representatives. See Art. I, § 2, Cl. 2. James Madison stated that "both ['resident' and 'inhabitant'] were vague, but the latter least so in common acceptation, and would not exclude persons *absent occasionally for a considerable time* on public or private business." 2 Farrand, *supra*, at 217 (emphasis added).[20]

[20] The practical construction of the term "Inhabitant" supports Madison's interpretation. In 1824, the House seated John Forsyth of Georgia, who at the time of his election was the United States' Minister to Spain. The Committee that recommended rejection of a challenge to his election observed: "The capacity in which he acted, excludes the idea that, by the performance of his duty abroad, he ceased to be an inhabitant of the United States; and, if so, inasmuch as he had no inhabitancy in any other part of the Union than Georgia, he must be considered as in the same situation as before the acceptance of the appointment." M. Clark & D. Hall, *Cases of Contested Elections in Congress* 497 (1834). Representative Bailey also pointed out that if the contrary proposition were accepted, sitting Members of the House would also be excluded from eligibility for election. *Ibid.*

The first Enumeration Act likewise used the word "inhabitant." Act of Mar. 1, 1790, ch. 2, § 5, 1 Stat. 103. And, using language echoing Madison's explanation of that word, the 1790 Act provided not only that every person would be counted at his "usual place of abode," but also that "every person occasionally absent at the time of the enumeration [shall be returned] as belonging to that place in which he usually resides in the United States." *Ibid.* The Act (like Madison's interpretation of the term "inhabitant") placed no limitation on the duration of the absence—which, considering modes of transportation in the late eighteenth century, was apt to be quite extended, particularly for persons overseas.[21] The language of the 1790 Act is unquestionably broad enough to encompass the present enumeration of federal military and civilian personnel stationed abroad, and this contemporaneous interpretation carries particular force in construing the pertinent constitutional language. *Bowsher* v. *Synar*, 478 U.S. 714, 723-724 (1986).

[21] At the time, the word "occasionally" did not necessarily mean "now and then" or "sometimes," as it now does. See *Webster's Third New International Dictionary* 1560 (1986). Dr. Johnson gave it the meaning "according to incidental exigence." 2 S. Johnson, *A Dictionary of the English Language* (1755) (Hildesheim Facs. ed. 1968). Accordingly, the fair implication is that the last-quoted phrase in the 1790 Act was intended to include persons who were away (even for a considerable time) for sufficient reason but with the intention of returning, and to exclude only those who had essentially abandoned the State in question and taken up permanent residence elsewhere in the United States or abroad. This conclusion is supported by the fact that Madison, who at the Constitutional Convention explained that the term "inhabitant" included those "absent occasionally" (even "for a considerable time"), was a member of the committee of the First Congress that drafted the Enumeration Act of 1790, which provided for inclusion of persons who were "occasionally absent." See T. Clemence, *Place of Abode* 8 (A.R. 169; J.A. 89).

Subsequent censuses were conducted under the same "occasionally absent" standard. Wright & Hunt, note 1, *supra*, at 925. Although the 1850 Act did not contain similar language, the instructions to Marshals for the conduct of the census that year stated that "[a]nyone who is temporarily absent on a journey, or for other purposes, without taking up his place of residence elsewhere, and with the intention of returning again, is to be considered a member of the family which the assistant marshal is enumerating." Bureau of the Census, *200 Years of U.S. Census Taking* 22 (1989). Similar instructions were followed for the 1860 census, *id.* at 24, and, ever since, categories of persons absent from their usual residence have nonetheless been counted at that place. See note 1, *supra*. This longstanding practice is entitled to great weight. *Dames & Moore* v. *Regan*, 453 U.S. 654, 686 (1981); *Smiley* v. *Holm*, 285 U.S. 355, 369 (1932).

In the court below, appellees relied on the language in Section 2 of the Fourteenth Amendment providing for apportionment of Representatives according to the number of persons "in each State." See J.S. App. 80a. But there is no indication that the Fourteenth Amendment was intended to overturn the settled practice of counting persons who were *not* physically present at their usual place of abode in the United States on the census date. Moreover, as the district court observed, the contrary interpretation appellees propose "finds no support in the case law," which instead interprets the "in each State" language to refer to actual inhabitants of the State—"that is, persons with some relation to the state," not "simply those who are physically in the state on census day." *Ibid.* In *Bethel Park*, the court found "no indication that the members of the Constitutional Convention had in mind any specific criteria by which persons were to be deemed residents of one state rather than another." 319 F. Supp. at 974. Consequently, "[a]llocation of what the *Bethel Park* court referred to as the 'fringe' populations has long been considered a discretionary decision open to revision as time unfolded and circumstances developed." J.S. App. 80a; see also *id.* at

81a (quoting 41 Op. Att'y Gen. 31, 33 (1949)). It is far too late in the Nation's history to suggest that enumeration of the population of the States must be based on a rigid rule of physical presence on the census date—a rule that has never been applied and that is especially out of place in an age of ever-increasing mobility.

B. The court likewise properly rejected appellees' contention that inclusion of federal personnel stationed abroad in state population totals violates the Census Act. J.S. App. 81a n.31. The Secretary of Commerce is directed by statute to conduct the decennial census "in such form and content as he may determine." 13 U.S.C. 141(a). This language "gives the Secretary broad discretion to determine how the census will be carried out, discretion which mirrors the broad mandate given to Congress" by Article I, Section 2, Clause 3 to provide for the enumeration "in such Manner as they shall by Law direct." J.S. App. 81a n.31. Because, as we have just explained, the Constitution itself poses no obstacle to the practice, the district court was clearly correct in concluding that "[t]he policy decision to apportion overseas federal employees [among the States] is well within the discretion afforded the Census Bureau under the Census Act." *Ibid.*

C. The district court was, however, clearly incorrect in holding that it nevertheless was arbitrary and capricious for the Secretary to use "home of record" (or comparable data) as the particular method for including federal personnel stationed abroad in the state apportionment for the 1990 census.

"The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983). It follows that "a reviewing court may not set aside an agency rule that is rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency by the statute." *Id.* at 42. Insofar as factual issues are con-

cerned, the standard generally requires only that the agency "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Id.* at 43 (quoting *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168 (1962)). In reviewing that explanation, a court must consider whether relevant factors were considered and whether there has been a "'clear error of judgment.'" *State Farm*, 463 U.S. at 43 (quoting *Bowman Transp., Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974)).

This, however, is no ordinary case of judicial review of agency action. Even if the Court concludes (contrary to our submission in Point I) that the conduct of the census is not insulated from judicial review under the APA, any such review must be exceptionally deferential. The Secretary's construction of the Census Act itself is, of course, entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 (1984). The Census Act, however, contains an exceedingly broad and open-ended delegation of authority to conduct the census in such "form and content" as the *Secretary* "may determine." 13 U.S.C. 141(a). Where, as here, the particular issue involved concerns a determination about the form and content of the census, the Secretary's judgments have "legislative" effect, and therefore are entitled to "more than mere deference." *Batterton* v. *Francis*, 432 U.S. 416, 424-426 (1977).

1. There can be no serious contention that the Secretary's decision in July 1989 to include federal personnel abroad in state apportionment counts (see A.R. 511-512; J.A. 120-122) was arbitrary and capricious. The district court properly concluded that the "flexibility of the 'usual residence' concept as applied by the Census Bureau over the years * * * demonstrates the broad discretion the Bureau has traditionally employed." J.S. App. 81a. In light of the past practice of including in the apportionment counts other categories of persons who are away from home on the census date, it plainly was rational for

the Secretary to treat those serving their country overseas in the same manner.

The reasons articulated by the Secretary fully support his decision, and surely manifest no "clear error of judgment." The Secretary first noted that the Defense Department "believes strongly that its employees should not be excluded from the apportionment counts because of temporary and involuntary residence overseas," and that "[m]any, if not most, of these military overseas consider themselves to be usual residents of the United States, even though they are temporarily assigned overseas." A.R. 511 (J.A. 120). The Secretary also relied on the precedent of including such personnel in the 1970 census, and the 1969 legal opinion of Assistant Attorney General Rehnquist that the Commerce Department enjoyed the discretion to do so. A.R. 512 (J.A. 121). That opinion in turn found it reasonable to assume that many persons living abroad vote in their home States and consider themselves to be represented in Congress by Members from their home States (A.R. 15 (J.A. 47))—factors that confirm the affinity that federal personnel stationed abroad retain for their home States.[22]

In addition, the Secretary considered the "growing bipartisan concern" of numerous Members of Congress that military and civilian personnel abroad should be counted. A.R. 511 (J.A. 120); see pages 7-8, *supra*. The House Report on the bill considered in 1988, for example, urged the equities of including such personnel in the census counts because they pay taxes, many of them vote, "they are stationed overseas in the course of service to their country," and excluding them from the census denies their "right to full and fair representation in Congress." H.R. Rep. No. 953, *supra*, at 3, 4; see generally 134 Cong. Rec. 25,798-25,804 (1988).[23] In a related vein, the Sec-

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[22] See also 42 U.S.C. 1973ff *et seq.* (guaranteeing right of uniformed service members and other persons overseas the right to vote in federal elections).

[23] The district court correctly rejected appellees' contention that it was somehow improper for the Secretary to consider such views

retary observed that inclusion of federal personnel abroad in apportionment counts would "avoid unnecessary debate," A.R. 511 (J.A. 120)—a desirable goal, both to facilitate final plans for the fast-approaching census, and to promote the public acceptability and absence of controversy that are necessary to a successful census. Finally, the Secretary pointed to the Defense Department's assurance that it was feasible to provide the necessary data on the usual residence of overseas military personnel and their dependents in time to meet the December 31, 1990 deadline for reporting to the President. A.R. 511-512 (J.A. 120-122).

2. The district court's objection was not to including federal personnel abroad as such, for it found nothing intrinsically irrational in that practice. Rather, the court objected to using home of record data for that purpose. Once again, the court was badly mistaken.

Given that the decision to include the federal personnel and dependents in the apportionment counts was manifestly reasonable, the Secretary's discretion is at its zenith in choosing an appropriate *method* of doing so and identifying the data on which to rely, with an eye to budgetary constraints and time limits. See *Marsh* v. *Oregon Natural Resources Council*, 490 U.S. 360, 377 (1989); *Kleppe* v. *Sierra Club*, 427 U.S. 390, 412 (1976). Accordingly, even

—in connection with both his 1989 decision to include overseas personnel and his 1990 decision to use home of record data for that purpose. J.S. App. 73a-75a. If the Secretary had undertaken an informal rulemaking proceeding on the question, he surely could consider (along with other comments received) what the court below characterized here as the "open, considered and reasoned expressions of individual and collective concern by members of Congress." *Id.* at 75a. Nor was there any violation of the principles of *INS* v. *Chadha*, 462 U.S. 919 (1983), in doing so. The views of Members of Congress that are not contained in a duly enacted law of course are not legally binding on the Executive Branch. But *Chadha* does not bar an official of the Executive Branch from taking such views into account where he deems them relevant. Cf. 462 U.S. at 955 n.19. Finally, the fact that the congressional support was "bipartisan" removes any suggestion of partisan advantage. Cf. *Montana*, slip op. 23-24.

lower courts holding that judicial review of census determinations is not completely barred have uniformly acknowledged the "wide latitude" afforded the Census Bureau "to select its methods, techniques and by those means to arrive at its own result." *City of Philadelphia*, 503 F. Supp. at 677 (quoted at J.S. App. 78a). In this case, the selection of home of record as the principal method of including federal personnel abroad clearly was, at the very least, not arbitrary and capricious. To the contrary, it was entirely reasonable.

a. Before the Secretary of Commerce decided in July 1989 to include federal personnel abroad in the apportionment counts, the Defense Department had independently decided to conduct a survey (with Census Bureau assistance) of military personnel stationed abroad. That survey was designed to elicit various information about such personnel and their families for Defense Department planning purposes and for the use of statisticians and others. See A.R. 433-458. Although the survey was not planned for apportionment purposes, when the Secretary of Commerce decided to include overseas military personnel in the decennial census, it was anticipated that the survey results could be used for apportionment purposes as well. A.R. 511 (J.A. 121).

Subsequently, however, the Defense Department dropped its plans to conduct its own survey or census of its personnel abroad, because of lack of funding and other constraints. Stip. ¶ 46 (J.A. 184); A.R. 787; see also note 4, *supra*. The Census Bureau then examined the three alternative approaches for including military personnel abroad based on data in existing Defense Department records: legal residence, last duty station in the United States, and home of record.[24] After doing so, the Secretary decided to utilize home of record—the same method

[24] The discussion in the text is confined to military personnel, because the vast majority of federal personnel included in the apportionment counts were members of the Armed Forces and their dependents. Stip. ¶¶ 54, 57 (J.A. 185-187).

that had been used for the 1970 census. The bases for doing so were entirely sound.

First, in view of all the currently available information, the technical staff of the Census Bureau concluded that "the Home of Record comes closest to the concept of the Usual Residence among the three data sources that DoD has available." A.R. 924 (J.A. 164). That judgment comported with the considered view of the House of Representatives, which passed a bill to mandate use of home of record data on the premise that it "most closely approximates the home State of individuals who are highly mobile, not by choice, but by virtue of their service to their country." H.R. Rep. No. 552, *supra*, at 3; accord J.A. 129 (quoted at page 9, *supra*) ("the state listed for home of record is the last location at which the members of the armed forces *CHOSE* TO RESIDE"). Moreover, home of record is the place to which the military will typically provide for the service member's return at the time of discharge, and it has the considerable virtue of "remain[ing] constant" in the face of the service member's often rapid mobility. J.A. 129.

The other methods were found to be significantly flawed by comparison. For example, when he recommended adoption of the home of record method, the Under Secretary explained that "because last duty station merely reflects the location of the facility to which a person is assigned, many military personnel and their dependents would be counted in states other than their actual previous U.S. residence (such as those assigned to the Pentagon, who would be counted as D.C. residents even though they lived in Maryland or Virginia)." A.R. 921 (J.A. 162-163). The last duty station also would often be a place to which the service member retains no affinity after being transferred.[25] And use of that method would "skew the census

[25] See A.R. 752 (remarks of Rep. Ridge during House subcommittee hearing on H.R. 2661, 101st Cong., 1st Sess. (1989), which would have required inclusion of overseas military personnel in apportionment counts) ("before I was shipped overseas I spent six months at Fort Benning, Georgia. I have not been since that time, at that time, or for the foreseeable future ever interested in being considered in any census as a resident of Fort Benning, Georgia. Northwestern Pennsylvania is my home.")

toward those few States with a large number of military bases" (134 Cong. Rec. 25,801 (1988) (Rep. Kennelly)) by including in those States' counts not only the substantial number of personnel stationed there, but also any who had left for an overseas tour. Similarly, the Under Secretary pointed out that a service member's legal residence —which is declared by a member of the Armed Forces for tax purposes (*CRS Study* 4 (A.R. 878; J.A. 149)) —does not necessarily reflect a substantial nexus to the State, especially since it may be chosen only because of its low tax rate. A.R. 921 (J.A. 162); see also A.R. 932 (J.A. 168) (a person may designate as his legal residence "a place where [he] was assigned at any point during military service, no matter how brief the assignment or how distant in time").[26]

Finally, the Under Secretary explained that the Defense Department had "agreed to use all automated records available to supplement [its] files in order to provide data of sufficient quality for apportionment purposes" and that Census Bureau staff would "work closely with DOD staff to assure the quality of those data." A.R. 921 (J.A. 162). The Under Secretary accordingly concluded that

[26] The Congressional Research Service had also studied the three available methods for allocating military personnel stationed abroad to particular States, and found that each has its advantages and disadvantages. Thus, it concluded that the home of record "may well reflect the person's own concept of his or her home State," although he or she may not return to that State at the end of the term of service; legal residence "reflects the State to which the person chooses to pay his or her taxes, but a person may choose a low or no tax State to claim as a legal residence"; and although last duty station may reflect where the person last resided and thus be comparable to the Census Bureau's usual residence rule, it may not actually indicate the State where a person lives because it "may be in a different State than where he or she resides." *CRS Study* 5-6 (A.R. 879-880; J.A. 151-152). The Secretary's choice among the three alternatives in these circumstances can scarcely be regarded as arbitrary and capricious.

"the complete 'home of record' data will constitute the most accurate data available from the Department of Defense." A.R. 919 (J.A. 158). In his letters to Members of Congress explaining the Department's decision (A.R. 925-942 (J.A. 165-168)), the Under Secretary pointed out that although approximately 7% of overseas personnel records lacked a home of record designation, the Defense Manpower Data Center planned to "use supplemental data from their automated records" to fill the gap and that, as a result, "the number of missing state designations will be negligible." See A.R. 931 (J.A. 167). Thus, the method by which the Secretary chose to include federal personnel abroad in state apportionment counts, like the decision to do so in the first place, was manifestly reasonable and was based on consideration of all relevant factors—in particular, the accuracy of all available data sources.

b. The district court did not address any of the foregoing factors supporting the Secretary's decision. Rather, as the district court saw it, the Secretary decided in July 1989 to incorporate overseas federal personnel in apportionment counts primarily because the Defense Department then planned to conduct a census of its personnel abroad concurrently with the general decennial census. The court correspondingly surmised that once the Defense Department withdrew its plans in December 1989, nothing but "inertial forces" drove appellants to use home of record data as a substitute for the Defense Department's cancelled survey, without regard to the accuracy of those data. J.S. App. 75a-76a. The court misunderstood the record and the basis for the Secretary's decisions.

The Secretary's July 1989 decision states that a "significant reason" for changing the Department's plans and counting federal personnel abroad was that the Defense Department had "just recently stated" that it was "feasible" to provide the necessary counts in time to meet the December 31, 1990, deadline for reporting to the President. A.R. 511 (J.A. 121). In other words, the "significant reason" was the expected *timing* of the information to be received from the Defense Department, not its particular character. Accordingly, the Under Secretary's recommendation, adopted by the Secretary, was only that overseas personnel be included provided that there was timely receipt of "acceptable data" from the Defense Department (A.R. 512; J.A. 122); the inclusion was not specifically conditioned on receipt of data from the planned survey.

The district court suggested that the Commerce Department did not take a fresh look at the accuracy of alternative data after the Defense Department cancelled its survey, and thus failed to answer the view previously expressed by a Defense Department witness at a congressional hearing that various sources of information in that Department's personnel records did not satisfy a "reasonable test of validity for apportionment purposes." J.S. App. 77a & n.29 (quoting A.R. 578). In fact, in recommending adoption of the home of record method, the Under Secretary quoted and responded directly to the Defense Department testimony that the district court cited, explaining that the Defense Department had since given assurances that its existing data "would be supplemented and improved by methodologies devised by technical experts who designed the overseas enumeration." A.R. 920 (J.A. 161).[27] Finally, although the district court made much of the Census Bureau's initial reliance on the Defense Department's proposed survey, which the court believed would have been preferable, that survey would have ascertained the person's last residence in the United States of six months or more in duration. A.R. 454, 497. Accordingly, like the last duty station method the Census Bureau considered and rejected, it would not necessarily have resulted in an accurate measure of a person's permanent affinity with the State in question.[28]

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[27] In any event, the views of the Defense Department, which is not responsible for the conduct of the census, are not entitled to substantial deference on what constitutes adequate data for that purpose.

[28] The district court also cited (J.S. App. 77a) the statement in the Census Bureau's 1987 plan for the 1990 census that assignment

Nor is there any basis for the district court's apparent view that an actual census of federal personnel was necessarily to be preferred to reliance on home of record in administrative records. See J.A. 106. The Census Act expressly authorizes the Secretary to rely on information furnished by other agencies, see 13 U.S.C. 6, and there was special reason to do so here. Unlike the problem in some other census situations, there is no question that the federal personel and dependents abroad actually exist; the only question is on what basis they will be assigned to particular States for apportionment purposes. Because the Secretary decided to rely on a measure that is contained in administrative records, those records were a fully adequate source, especially given considerations of feasibility that necessarily confronted the Census Bureau at the time. At least it was not arbitrary and capricious for the Secretary so to conclude. See *Bethel Park*, 319 F. Supp. at 979 ("There are presently a large number of members of the Armed Services abroad and the most feasible method of enumerating them as among the population of the United States is to count them back to the States wherein they were residents before entering the Armed Services."). The court below in fact acknowledged that "methods for dealing with the

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of military personnel abroad would be "arbitrary and operationally difficult." See J.A. 212. In context, however, this statement appears to have meant nothing more than that assignment would be "arbitrary" in the sense that any rule of general applicability (such as those involving seafarers, college students, etc.) may be so labeled. The district court was also mistaken in believing that home of record data might be inaccurate because a home of record might be designated for tax purposes. J.S. App. 76a-77a. Although the Census Bureau expressed the same view in 1976, based on a 1976 study of state taxation of military personnel (J.A. 55), the cited study does not address home of record; it instead discussed the selection of legal residence for tax purposes. See Advisory Commission on Intergovernmental Relations, *State Taxation of Military Income and Store Sales* 4-5, 24, 27-34 (1976); 50 U.S.C. App. 574. The Secretary in fact rejected general reliance on legal residence for apportionment purposes precisely for the reason mentioned in the 1976 study. See page 43, *supra*.

subclasses of persons" away from what might be considered their domicile or legal residence may properly take account of "the administrative practicability and accuracy of making a count of a member of the subclass at a particular location." J.S. App. 60a-61a n.24.

In any event, the question for a reviewing court is not which method of allocating personnel abroad (last duty station, home of record, legal residence) or which data base (actual survey or administrative records) is "best." That judgment is entrusted to the Secretary. The question is whether the Secretary failed to consider the relevant factors or made a clear error of judgment. *State Farm*, 463 U.S. at 43; cf. *American Textile Manufacturers Institute, Inc.* v. *Donovan*, 452 U.S. 490, 527-529 (1980). The record confirms that the Secretary carefully considered the strengths and weaknesses of the various proposals and exercised sound judgment in making his choice.

Finally, even if the district court were correct that there were certain inaccuracies or anomalies in the home of record data for some (unspecified) percentage of the military personnel abroad, it does not follow that the *entire* population of such personnel should be excluded from the apportionment counts. The record shows that the apportionment of Representatives would not have been changed under any of the available alternative methods, and that, of the three, home of record was *most favorable* to Massachusetts. A.R. 887.[29]

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[29] The *CRS Study* also found that allocating military personnel among the States according to home of record is "closest to the population distribution of the entire population," whereas an allocation based on legal residence varies from the distribution of the entire population nearly three times as much as home of record and an allocation based on last duty station varies ten times as much. A.R. 880 (J.A. 153).

III. THE DISTRICT COURT'S REMEDY WAS, IN ANY EVENT, IMPROPER

Even if the district court were correct in holding that the Secretary did not adequately explain his determination, the relief it ordered was wholly improper. As this Court recently explained, the options of a reviewing court in such circumstances are narrowly confined:

> If the record before the agency does not support the agency action, if the agency has not considered all the relevant factors, or if the reviewing court simply cannot evaluate the challenged action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.

Florida Power & Light Co. v. *Lorion*, 470 U.S. 729, 744 (1985); accord *PBGC* v. *LTV Corp.*, 110 S.Ct. 2668, 2680 (1990); *Camp* v. *Pitts*, 411 U.S. 138, 142-143 (1973); *Overton Park*, 401 U.S. at 420. Adherence to that principle is especially necessary in the present context, because Congress has expressly conferred broad discretion and responsibility on the Secretary of Commerce to conduct the census, which necessarily includes authority to reevaluate data and methodologies when possible defects are brought to her attention. The district court improperly usurped that function by foreclosing any further consideration of including 919,810 persons in the state apportionment counts.

Furthermore, even if the court could, under ordinary APA principles, order the *Secretary* to delete overseas federal personnel and their dependents from the apportionment counts, it had no authority to enter an injunction requiring the *President* to effect a new apportionment of the House of Representatives by transmitting a revised statement to Congress pursuant to 2 U.S.C. 2a. As we have explained, the President is not even subject to suit under the APA. In any event, the APA does not override established principles governing the denial of

equitable relief. 5 U.S.C. 702. In particular, courts of equity "should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 312 (1982); see, *e.g.*, *Webster*, 486 U.S. at 604-605; *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329-330 (1944). Here, the public interest required denial of an injunction, because such relief constitutes an extraordinary intrusion into matters committed by the Constitution and laws to the political Branches, and effects an extraordinary disruption of the redistricting process that the expedited schedule in 2 U.S.C. 2a was designed to facilitate. See *Bethel Park*, 319 F. Supp. at 980 ("Even if plaintiffs had * * * prevailed, injunctive relief in their favor would be denied as detrimental to the public interest.").

CONCLUSION

The judgment of the district court should be reversed and the case remanded with instructions to enter judgment for the appellants.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

JOHN G. ROBERTS, JR.
Deputy Solicitor General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

MICHAEL JAY SINGER
MARK B. STERN
LORI M. BERANEK
Attorneys

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APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article I, Section 2, Clauses 1, 2 and 3 of the United States Constitution provide:

> The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.
>
> No person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.
>
> Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

2. Article I, Section 8, Clause 18 of the United States Constitution provides:

> SECTION 8. The Congress shall have Power
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> • • • • •
>
> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

3. Sections 2 and 5 of the Fourteenth Amendment to the United States Constitution provide:

> SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.
>
> • • • • •
>
> SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

4. 2 U.S.C. 2a provides:

> **Reapportionment of Representatives; time and manner; existing decennial census figures as basis; statement by President; duty of clerk**
>
> (a) On the first day, or within one week thereafter, of the first regular session of the Eighty-second Congress and of each fifth Congress thereafter, the President shall transmit to the Congress a statement showing the whole number of persons in each State, excluding Indians not taxed, as ascertained under the seventeenth and each subsequent decennial census of the population, and the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives by the method known as the method of equal proportions, no State to receive less than one Member.
>
> (b) Each State shall be entitled, in the Eighty-third Congress and in each Congress thereafter until the taking effect of a reapportionment under this section or subsequent statute, to the number of Representatives shown in the statement required by subsection (a) of this section, no State to receive less than one Member. It shall be the duty of the Clerk of the House of Representatives, within fifteen calendar days after the receipt of such statement, to send to the executive of each State a certificate of the number of Representatives to which such State is entitled under this section. In case of a vacancy in the office of Clerk, or of his absence or inability to discharge this duty, then such duty shall devolve upon the Sergeant at Arms of the House of Representatives; and in case of vacancies in the offices of both the Clerk and the Sergeant at Arms, or the absence or inability of both to act, such duty shall devolve upon the Doorkeeper of the House of Representatives.

(c) Until a State is redistricted in the manner provided by the law thereof after any apportionment, the Representatives to which such State is entitled under such apportionment shall be elected in the following manner: (1) If there is no change in the number of Representatives, they shall be elected from the districts then prescribed by the law of such State, and if any of them are elected from the State at large they shall continue to be so elected; (2) if there is an increase in the number of Representatives, such additional Representative or Representatives shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State; (3) if there is a decrease in the number of Representatives but the number of districts in such State is equal to such decreased number of Representatives, they shall be elected from the districts then prescribed in the law of such State; (4) if there is a decrease in the number of Representatives but the number of districts in such State is less than such number of Representatives, the number of Representatives by which such number of districts is exceeded shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State; or (5) if there is a decrease in the number of Representatives and the number of districts in such State exceeds such decreased number of Representatives, they shall be elected from the State at large.

5. 13 U.S.C. 141(a) and (b) provide:

Population and other census information

(a) The Secretary shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the "decennial census date", in such form and content as he may determine, including the use of sampling procedures

and special surveys. In connection with any such census, the Secretary is authorized to obtain such other census information as necessary.

(b) The tabulation of total population by States under subsection (a) of this section as required for the apportionment of Representatives in Congress among the several States shall be completed within 9 months after the census date and reported by the Secretary to the President of the United States.

* * * * *

6. 5 U.S.C. 701(a) provides:

§ 701. Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

7. 5 U.S.C. 706 provides:

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions of law found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

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Supreme Court, U.S.
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NO. 91-1502

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

BARBARA FRANKLIN, SECRETARY OF COMMERCE, et al.,

Appellants,

v.

THE COMMONWEALTH OF MASSACHUSETTS, et al.,

Appellees.

On Appeal From the United States District Court
for the District of Massachusetts

BRIEF OF THE APPELLEES COMMONWEALTH OF MASSACHUSETTS, et al.

SCOTT HARSHBARGER
ATTORNEY GENERAL
OF MASSACHUSETTS

Dwight Golann*
Steve Berenson
Assistant Attorneys General
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2200

John P. Driscoll, Jr.
Edward P. Leibensperger
Neil P. Motenko
Special Assistant Attorneys General
Nutter, McClennen & Fish
One International Place
Boston, Massachusetts 02110
(617) 439-2000

*Counsel of Record

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QUESTIONS PRESENTED

Article I, Section 2, Clause 3 of the United States Constitution provides that seats in the U.S. House of Representatives "shall be apportioned among the several States . . . according to their respective Numbers, which shall be determined by [an] actual Enumeration . . . ." Section 2 of the Fourteenth Amendment modified this language by requiring that "Representatives shall be apportioned . . . counting the whole number of persons in each State. . . ." The questions presented by this case are:

1. Whether the Secretary of Commerce's decision to count overseas federal employees as residents of particular states for purposes of congressional apportionment, based on "home of record" data which the Census Bureau had found to be "arbitrary," violated the Administrative Procedure Act.

2. Whether the Secretary of Commerce's decision to apportion overseas employees to particular states in which they did not then reside violated restrictions imposed on apportionment by the Fourteenth Amendment, considered in light of the Amendment's legislative history and contemporaneous interpretation.

3. Whether the remedy ordered by the district court, which does not affect states other than Massachusetts and Washington or the census generally, and requires solely ministerial action by government officials, was appropriate in light of the special circumstances of this case.

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STATEMENT OF THE CASE

This case arises from a 1989 decision by the Secretary of Commerce to reverse the historic practice of federal census authorities and override rules which the Census Bureau itself had adopted for the conduct of the 1990 Census. The Secretary decided to treat federal employees who were living in foreign countries as residents of particular states for purposes of apportioning seats in Congress. The parties have stipulated that this change, which was based on data which the Census Bureau had previously rejected as unreliable, had the effect of depriving Massachusetts of one of its eleven congressional seats and transferring that seat to the state of Washington.

Article I, § 2, cl. 3 of the Constitution, as modified by the Fourteenth Amendment, requires that apportionment decisions be based on an "actual Enumeration" of the "whole number of persons in each state." Pursuant to this mandate, with but a single exception, census authorities have never counted persons living overseas on the census date as residents of particular states. In 1989, the Secretary of Commerce reversed this policy.

In 1990, after the only factual premise for the policy reversal -- that the Department of Defense would conduct an actual enumeration of its overseas employees -- disappeared, the Secretary failed to consider returning to the census' historic practice. Instead, he ordered overseas federal employees to be assigned to states based on administrative file

data that both the Census Bureau and the Department of Defense had publicly and repeatedly criticized as invalid and unreliable. In order to place the Secretary's 1990 decision in context, it is necessary to review the relevant constitutional, statutory and historical framework.

A. Constitutional, Statutory and Historical Background.

The 1787 Constitutional Convention. The fundamental issue confronted by the Framers in 1787 was that of allocating the states' representation in the national legislature. After the Great Compromise, in which the states agreed to apportion seats in the House of Representatives based on population, Wesberry v. Sanders, 376 U.S. 1, 13-14 (1964), the Framers addressed the issue of how congressional representation should be adjusted over time in light of demographic changes. Some delegates argued against "[s]hackling the Legislature too much. We ought to choose wise & good men, and then confide in them." 1 The Records of The Federal Convention of 1787 (Farrand ed. 1911) (hereinafter "Farrand") 578 (quoting Roger Sherman).

Most of the Framers, however, disagreed with the argument that Congress should be given complete discretion to apportion itself.1/ The Convention decided against granting the House

---

1/ George Mason commented: "From the nature of man we may be sure, that those who have power in their hand will not give it up while they can retain it...." Id. Edmund Randolph, citing

(footnote continued)

of Representatives full power to decide reapportionment issues. Instead, it mandated that reapportionment be based on an "actual Enumeration," that is, a headcount, of the population. U.S. Const., art. I, § 2, cl. 3 (emphasis added).

The Framers were particularly concerned that the census be conducted on a uniform and nonpolitical basis. During the 1780's, "[t]he Continental Congress had [asked] the states to take censuses for apportionment purposes and had found either that states did not comply or that their methods were not uniform." M. Anderson, The American Census, 10 (1988). The same lack of uniformity had resulted from state-by-state censuses taken during the Revolutionary War. C. Wright and W. Hunt, The History and Growth of the United States Census, 12 (1900). Often, states had either understated their numbers to avoid direct federal taxation, or overstated their populations in order to increase their political power.2/ The Framers

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(footnote continued)

Governeur Morris, noted that because of the problem "of advantage being taken of the Legislature in pressing moments, it was an additional reason, for tying their hand in such a manner that they could not sacrifice their trust to momentary considerations." Id. at 579-80. See also Id. at 586 (Mason and Morris), 583 (Ghorum), 584 (Madison).

2/ The Framers responded to this problem in part by basing both direct taxation and representation on the same apportionment count. The Federalist No. 54. With the abolition of direct federal taxation, however, this constitutional check against political manipulation has disappeared.

therefore mandated that a national census be conducted, so as to create a consistent, apolitical base of data for the periodic reapportionment of Congress. M. Anderson, supra, at 11. See U.S. Department of Commerce v. Montana, No. 91-860, Slip Op. at 23-24 (1992) (hereinafter "Montana") (noting that "to the extent that the potentially divisive and complex issues associated with apportionment can be narrowed by the adoption of both procedural and substantive rules that are consistently applied year after year, the public is well served....")

Early Census Practice: The Usual Residence Rule. To carry out this mandate, the First Congress enacted the First Decennial Census Act on March 1, 1790. Appendix to Jurisdictional Statement ("J.S. App.") 59a. 1 Stat. 101. The 1790 Act stated the basic rule of enumeration which has been applied ever since: that "every person" should be counted at his or her "usual place of abode" or at "that place in which he usually resides in the United States." 1 Stat. 101, 103 (emphasis added). J.S. App. 59a.

The First Congress thus implemented the constitutional imperative by creating the concept of "usual residence" to determine where to apportion the American population. Id. Joint Appendix ("Joint App.") 199. This concept, which the Census Bureau has described as the "usual residence rule," has been the "guiding principle" for the conduct of the decennial

census for two hundred years. J.S. App. 59a. Joint App. 173 (Stip. 4). Under the usual residence rule, a person must be counted at the place where he or she is living and sleeping most of the time as of the date the census is taken. J.S. App. 59a. Joint App. 173 (Stip. 5). The only exception is for persons, such as travelers at inns and hotels, who are "occasionally absent" from their homes for a few days or weeks as of the census date. See 1 Stat. 101, 103; Joint App. 174 (Stip. 8).

During the first censuses, federal authorities confronted the issue of how to apply this rule to those Americans who were living outside any state's boundaries on the census date. Significant numbers of American soldiers were stationed at forts and posts in the western territories from the nation's earliest days. J.S. App. 61a. Joint App. 177 (Stip. 16). Beginning with the censuses of 1830 and 1840, federal enumerators addressed the specific question posed in this case, that of where to count troops and other federal employees who were stationed in a foreign country on the census date. Joint App. 177 (Stip. 18).

Census authorities decided to count soldiers and other persons living outside state boundaries (and, in 1830 and 1840, the United States) as part of the overall American population. See Knox v. Lee (The Legal Tender Cases), 79 U.S. (12 Wall.) 457, 536 (1871). They were enumerated, however, as residents

of the out-of-state posts where they were living, and were never apportioned back to states where they had lived in the past or might reside in the future. J.S. App. 61a-63a. Joint App. 175 (Stip. 10); 177 (Stip. 18).[3/] During the eighty years between the ratification of the Constitution and the adoption of the Fourteenth Amendment, the federal government never varied in its commitment to the usual residence rule, Joint App. 176 (Stip. 14), nor did it ever include persons living outside any state in apportionment counts. J.S. App. 60a.

The Adoption Of The Fourteenth Amendment And Subsequent Practice. In 1866, following the Civil War, the states again confronted the issue of how to allocate their representation in the House. See Joint App. 235 (Stip. Exh. C: Justice Dept. analysis of legislative history of 14th Amendment); see also J.S. App. 29a, 62a n.25.

The drafters first proposed that seats in the House be allocated according to the number of "legal voters" or "citizens" in each state. Congressmen from the New England states, however, had large numbers of aliens, as well as women and children left behind by western pioneers, in their

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3/ This practice was based on the usual residence rule, not on an absence of data. Because census authorities conducted an oral census, that is, an "actual Enumeration," they could easily have asked troops what state they considered to be their permanent home. Joint App. 174 (Stips. 6, 7). Also, the states of origin of federal soldiers were listed in War Department records of that era. Joint App. 177 (Stip. 17).

populations, and so favored a standard of apportionment based solely on current residence within the borders of a state. The suffrage and citizenship-based proposals were defeated in committee, in favor of an apportionment standard based on residency. See J.S. App. 62a n.25. Joint App. 237. As ratified in 1868, the Fourteenth Amendment read in relevant part as follows:

> Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State . . . .

U.S. Const., amend. XIV, § 2 (emphasis added).

Two years later, in the 1870 census, federal authorities confronted the issue of how to apply the newly-ratified Amendment to apportion federal troops from the North who were occupying the former rebel states. In their first construction of the Amendment, federal census authorities applied the usual residence rule so as to apportion northern troops to the southern states in which they were then posted, rather than to their northern states of origin. See J.S. App. 62a. Joint App. 175 (Stip. 10). They did so despite the fact that the predictable effect of this interpretation was to increase the representation of the former rebel states in Congress throughout the decade of the 1870s. This interpretation was confirmed by formal rules adopted in 1880. J.S. App. 63a.

In 1900 and succeeding censuses, federal authorities repeatedly counted Americans living overseas as part of the

total population of the United States, but again did not apportion them to states. Joint App. 177 (Stip. 18), 179 (Stip. 26). In 1970, for the first time in the nation's history, the Census Bureau did apportion overseas federal employees to particular states. Joint App. 179-80 (Stips. 26, 28). J.S. App. 64a. The decision was based on the fact that large numbers of troops were then serving in Vietnam, and on the expectation that the act would be purely symbolic, in that apportioning overseas troops would not change the representation of any state in Congress. Borough of Bethel Park v. Stans, 449 F.2d 575, 581 (3rd Cir. 1971).[4/]

In 1980, the Census Bureau returned to its historic practice of excluding overseas federal employees from apportionment counts. J.S. App. 65a. The Bureau's reasons included the fact that overseas federal employees were not included in the apportionment counts in any census other than 1970, that the "home of record" data used to assign soldiers to states in 1970 was of unknown reliability, and that the number of overseas employees had dropped from approximately 1.6 million to about 900,000. Joint App. 55. See J.S. App. 64a-65a.

4/ In fact, the apportionment of overseas federal employees to states in 1970 did cause a congressional seat to shift from Connecticut to Oklahoma. Joint App. 179 (Stip. 28). However, the decision was not challenged in the courts.

Conduct of the 1990 Census. Pursuant to statutory obligation, 13 U.S.C. § 141(f)(1), in April 1987 (Administrative Record - "A.R." 213), the Bureau adopted a formal policy paper which defined the rules to be applied in the 1990 enumeration. Joint App. 180 (Stip. 32), 199-228 (policy paper). The Census Director noted in that paper that the usual residence rule "was adopted to comply with constitutional requirements," and reaffirmed the Bureau's intent to adhere to that rule in 1990. Joint App. 205, 208. The Bureau planned to count overseas federal employees as part of the overall American population but not to apportion them to particular states because, the Bureau concluded, it would be "arbitrary" to do so. Joint App. 200, 212 (emphasis added).[5/]

During the late 1980s, the Department of Commerce and the Census Bureau repeatedly opposed several legislative proposals to apportion overseas employees to states on the grounds, among others, that to do so would be inconsistent with the usual residence rule. Joint App. 180-181 (Stips. 33, 34, 36, 37); 110, 112, 118. The Departments of Commerce and Justice also expressed "serious doubt as to the constitutionality" of the

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5/ The Bureau's 1987 rules stated that in 1990 (as in every prior census since 1790) all federal civilian and military employees who were stationed at domestic posts should be apportioned to the place where they were usually living and sleeping as of the census date, rather than to their states of origin. Joint App. 201, 222.

proposals under the Fourteenth Amendment. Joint App. 241 (Stip. Exh. C); Joint App. 111, 113, 119. J.S. App. 65a. None of the proposals was enacted into law. Id.[6/]

The Census Bureau proceeded to apply its rules to domestic military and civilian federal employees in 1990, as to other Americans, and apportioned them to the states where they were living on the census date. Joint App. 174-5 (Stips. 9, 10). But on July 31, 1989, then-Secretary of Commerce Robert Mosbacher decided to reverse the Census Bureau's prior policy and disregard the usual residence rule as to overseas employees alone. He instructed the Bureau to apportion federal employees living overseas to various states which were not their usual residences. Id. (Stips. 8, 9, 10).

The Secretary adopted a two-page "decision memorandum" listing three basic factors for the policy reversal. Joint App. 120. It was summarized by the district court as follows:

> "First, from a political perspective, the memorandum proposed '[t]o satisfy what appears to be a growing bipartisan concern of the Congress and to avoid unnecessary debate.'
>
> Second, from a factual perspective, the memorandum reported that the Department of Defense would be conducting a census of its military and civilian employees and consequently 'it is now feasible to provide the necessary counts of usual residents' in a timely manner.
>
> Third, from a legal perspective, the memorandum referred to the 1969 opinion letter of the Assistant Attorney General rendered in connection with the 1970 census, concluding that such a policy decision was "in the discretion of the Director of the Census."

J.S. App. at 66a.

The factual basis for the Secretary's decision, the promised Department of Defense survey, was especially important because the Constitution requires that the census be based on an "actual Enumeration," i.e., a headcount, of the population. U.S. Const. art. I., § 2, cl. 3. The Defense Department's agreement to actually enumerate its employees was crucial because DOD personnel and their dependents made up nearly 98 percent (901,880 of 922,819) of the federal employees who were apportioned to states in 1990. Joint App. 185 (Stip. 53). The factual basis for the Secretary's decision was abruptly invalidated, however, in December of 1989, when the DOD cancelled its promised enumeration. J.S. App. 67a, 75a-76a. Joint App. 184 (Stip. 46).

At this point the Census Bureau, "responding to what appear to have been inertial forces which did not permit even thinking about turning back once the policy reversal had been announced," continued to execute the Secretary's commitment to

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6/ Only a single bill that would have required the apportionment of overseas federal employees, H.R. 4903, was passed by one House of Congress. This occurred in 1990, almost a year after the Secretary's 1989 decision to include overseas employees in the apportionment counts. Joint App. 184 (Stip. 49). Congress has never enacted a statute calling for apportionment of overseas federal employees, nor have the defendants ever promulgated any regulation on the subject. Joint App. 178 (Stip. 20).

apportion overseas federal employees to states. J.S. App. 76a. The Administrative Record shows no evidence that the Secretary reconsidered his decision in light of changed circumstances. Id. At oral argument, the district court attempted to elict some rationale for the Secretary's failure to reconsider. The colloquy was as follows:7/

> Justice Dept.: . . . At that point, July 31st 1989, Secretary Mosbacher made an announcement. He made a commitment to Congress that we're going forward with it, we're going to include the overseas federal employees . . .
>
> Judge Woodlock: All of that -- so, what it is, is a kind of Brer Rabbit and the tar baby. I mean, he hit it already and so he couldn't let go. And, so, he wanted to continue with it. Is that it?
>
> Justice Dept.: Well, he made a commitment to Congress. Congress has relied on that decision and an issue --
>
> Judge Woodlock: Congress made a commitment--
>
> Judge Bownes: He made a commitment to certain people.
>
> Judge Woodlock: And Congress made a commitment to the Department of Defense to provide them with a budget.
>
> Justice Dept.: I'm not aware of that. But he made a commitment to Congress.
>
> Judge Woodlock: And, so, the justification for it was DOD told them they could do it, they would do a head count and it was too late in December of '89 to change it?

7/ The transcript of the hearing below has been lodged with the Clerk of this Court.

> Justice Dept.: That's correct, Your honor.
>
> Judge Woodlock: That's the justification that makes it not arbitrary and capricious?
>
> Justice Dept.: That's correct. . . .

Tr. 90-92. See also Tr. 101-102.8/

These factual representations, taken with the absence of any evidence of reconsideration in the Administrative Record, led the three-judge court to conclude that the Secretary had in July 1989 foreclosed reconsideration of his decision to overrule the Census Bureau's historic practice on overseas employees. J.S. App. 78a-79a. The Secretary would not reconsider his decision even in December 1989, when the only factual basis cited for it -- DOD's promise to conduct a true enumeration in order to cure what the Census Bureau had previously called "arbitrary" data -- disappeared.

In the absence of such an enumeration, which has been the basis for the domestic census both historically and in 1990, the Secretary decided to base the apportionment on administrative file data. The Secretary first decided to use personnel data on each employee's "last U.S. address of six months duration." J.S. App. 184a (Stip. 47). See p. 23,

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8/ The Secretary also argued below that it was "too late" even in December 1989 to return to prior policy. The court noted, in response, that it was not until mid-1990 that the Census Bureau even decided what apportionment data to use, and that it was therefore certainly possible to refrain from apportioning at all. Tr. 91-92.

infra. In the summer of 1990, however, months after the April census date, the DOD informed the Census Bureau that it could not provide the necessary data to apportion its employees based on "last six months U.S. address" either. Joint App. 184 (Stip. 48).

The Census Bureau ultimately decided to use DOD file data on overseas employees' "homes of record." This was the same data that the Bureau had repeatedly declared to be too unreliable to use for apportionment in 1990, J.S. App. 76a; which it had opposed using as the basis for apportionment for twenty years, see Joint App. 55, 61, 79, 136; A.R. 37, 41, 43, 83, 224, 832, 857; and which the Bureau had formally concluded in 1987 "would be arbitrary" to use. J.S. App. 88a (emphasis in original). The Bureau had opposed the use of home of record data, among other reasons, because it was rife with errors, and was inconsistent with the usual residence rule. See infra at 24-26. Nevertheless, the Secretary failed to consider an obvious alternative, and home of record data was ultimately used. J.S. App. 76a.

The results from the 1990 census of overseas federal employees were uneven at best. These results are described in detail at pp. 27-28, infra. The distribution of DOD's home-of-record file data among the states was significantly different from the distribution of the domestic American population. J.S. App. 89a-90a. The parties have stipulated

that as the direct result of the apportionment of overseas federal employees, Massachusetts lost one of its existing eleven seats in Congress. Joint App. 183 (Stip. 42).

B. Proceedings Below.

After investigation confirmed that the loss of its congressional seat was caused by the Secretary's decision to include overseas federal employees in state apportionment counts, on May 1, 1991, the Commonwealth and two registered voters filed suit in federal district court, claiming, inter alia, that the Secretary's decision violated the restrictive language of the Fourteenth Amendment and was arbitrary, capricious and an abuse of discretion, in violation of the Administrative Procedure Act. Joint App. 20-35.[9/]

The parties agreed to submit the case for decision on a Joint Stipulation together with the Administrative Record. The Chief Justice of the First Circuit assembled a three-judge panel to hear the case pursuant to 28 U.S.C. § 2284.[10/] Cross-dispositive motions were filed on November 5, 1991.

9/ Massachusetts also argued that the formula used to allocate seats in Congress among the states violates the Constitution. That claim was denied by the district court and is foreclosed by this Court's recent decision in Montana. Massachusetts does not press this claim on appeal.

10/ In light of the Secretary's reference to the lower court's "parochial" decision, Application for Stay at 12, the plaintiffs note that the panel that heard this case was made up of judges from three separate states.

Joint App. 10-11.[11/] The court heard oral argument on December 6, 1991, and issued its decision on February 20, 1992. Joint App. 16.

C. The Decision Below.

The district court's narrow ruling rejected the plaintiffs' constitutional claims, but concluded that the Secretary of Commerce had violated the Administrative Procedure Act, 5 U.S.C. § 551 et seq., in the manner by which he decided to include overseas employees in the 1990 apportionment counts. J.S. App. 81a-82a. The district court deferred to the Secretary's power to conduct the decennial census and to Congress' power over reapportionment decisions, and did not limit the future operation of the census or apportionment system in any way, even as to apportioning overseas employees. Id. at 79a.

The court carefully considered whether to remand the case to the Secretary for reconsideration. The three-judge panel decided against a remand for the following reasons. First, "the practical process of reapportionment" required a quick resolution. J.S. App. 82a. Second, counsel had informed the

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11/ Washington state did not intervene as a party but requested to participate as an amicus in the case, as it did in the Montana litigation. Washington filed a brief requesting that the case be dismissed for failure to join an indispensable party. J.S. App. 17a-18a. The district court concluded that the case could proceed despite Washington's refusal to participate as a party. Id. at 18a-20a.

court that the Secretary would not reconsider his choice even in 1989-90 because, as was stressed, the Secretary felt that he had made a "commitment to Congress" in July 1989 which barred him from reconsidering the decision regardless of what facts later came to light. See supra at 12. In these circumstances, the district court concluded that a remand would be a futile and, in light of time constraints, harmful exercise.

The parties had stipulated that if overseas federal employees were not included in apportionment counts, Washington state would lose the additional seat that it had been awarded in the 1990 reapportionment, and Massachusetts would retain its existing eleven congressional seats. Joint App. 183 (Stip. 42). None of the other 48 states would be affected. Id. J.S. App. 83a n.33. Applying this stipulation, the three-judge court ordered the Clerk of the House (who had agreed to be bound by any order that the court might enter, J.S. App. 2a-3a n.1), to issue new certificates to the two states. J.S. App. 83a.

The Secretary moved for reconsideration of the decision, and in that context filed two "Declarations," or affidavits, of officials which attempted to explain how the Secretary had reached his decision. In a per curiam opinion, the court found that these filings violated agreements of counsel and case management understandings reached with the court, as well as constituting "post hoc rationalizations" of the type that this Court has rejected in APA cases. It therefore ordered the

Declarations stricken from the record. J.S. App. 93a. The Secretary did not appeal that order.

SUMMARY OF ARGUMENT

I. The district court concluded that the Secretary of Commerce's decision to apportion overseas federal employees to states where they were not residing, based on data which the Census Bureau had concluded was "arbitrary," violated the Administrative Procedure Act. That ruling was correct.

The Secretary's 1989 decision to reverse Census Bureau policy, based on the Defense Department's promise to conduct an "actual Enumeration," U.S. Const. art. I, § 2, cl. 3, may have been sustainable under the APA. But when the DOD abruptly cancelled its census, the Secretary insisted upon apportioning on the basis of "home of record" file data, which both the Census Bureau and the Defense Department had recently condemned as arbitrary and unreliable for apportionment purposes. The use of this data was arbitrary, and violated the APA (pp. 21-28).

Moreover, after the only factual basis for the Secretary's 1989 decision to reverse agency policy -- the DOD's promised enumeration -- disappeared, the Secretary was obligated to consider policy alternatives (such as returning to historic practice) and to give a "reasoned basis" for whatever decision he reached. Instead, because he had made an inflexible

"commitment" to certain members of Congress, the Secretary failed to consider obvious alternatives or provide a viable rationale for his policy. This, too, was arbitrary and capricious (pp. 29-30).

II. The Fourteenth Amendment restricted the language of the original Apportionment Clause, requiring that representation in Congress be based solely on the "whole number of persons in each State." U.S. Const. amend. XIV, § 2. The legislative history and contemporaneous interpretations of the Apportionment Clause and the Fourteenth Amendment demonstrate that the drafters' intent was to restrict the basis for apportionment to the current inhabitants of each State. Because the DOD's home of record data did not describe employees' current states of residence, its use for congressional apportionment violated the Fourteenth Amendment (pp. 30-38).

III. Judicial review under the APA of the Secretary's actions with regard to the conduct of the census is not precluded by statute, nor are such actions committed to agency discretion by law. The conduct of the decennial census must be subject to external scrutiny in order to insure a uniform and apolitical base of data for apportionment decisions, as intended by the Framers. A meaningful standard exists for review of census decisions (pp. 40-44). Moreover, Congress has not explicitly precluded APA review of the census, and nothing in the statutory framework implicitly precludes APA scrutiny (pp. 45-51).

IV. The lower court's orders were proper. Although remand is the presumptive remedy for APA violations, a remand is not appropriate where, as here, it would cause serious and irremediable harm. Moreover, a remand would be futile in this case, since it is presently impossible to improve on the data which the Census Bureau itself found to be arbitrary (pp. 51-57).

The lower court's orders are reasonable, in that they affect no states other than Washington and Massachusetts, and have no impact on the census counts generally. Moreover, the court's orders require solely ministerial action by government officials and respect the authority of Congress to reapportion by statute (pp. 57-63).

ARGUMENT

I. THE SECRETARY'S DECISION TO BASE APPORTIONMENT OF OVERSEAS FEDERAL EMPLOYEES ON HOME OF RECORD DATA WAS ARBITRARY AND CAPRICIOUS.

The decisions of federal administrative agencies are subject to judicial review under section 706(2) of the APA. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 413-14 (1971). Although "the Secretary's decision is entitled to a presumption of regularity, . . . that presumption does not shield his action from a thorough, probing, in-depth review." Id. at 415.

A. The Secretary Acted Arbitrarily by Abandoning an Enumeration in Favor of Home of Record Data.

The Secretary of Commerce decided in 1989 to reverse the historic practice of the decennial census and apportion overseas employees to states. As noted by the lower court, while the Secretary considered three factors in making his decision, one factor -- the Defense Department's promise to conduct an actual enumeration of its overseas employees -- was crucial. J.S. App. 66a.

The DOD's promise was especially significant because the planned enumeration "was expected to generate the kind of reliable information about home states of [overseas] personnel that had not been available for previous census counts." J.S. App. 75a. Joint App. 121. Indeed, a primary reason for the Secretary's decision to return to historic census practice in the 1980 Census was that the home of record data used in 1970 had proven to be unreliable. J.S. App. 64a-65a. Joint App. 55, 61, 180 (Stips. 29-30). A.R. 41. The DOD's promise to enumerate its employees was also important because it meant that the overseas count would use the method of counting -- actual enumeration -- which is specified in the Apportionment Clause and which the decennial census had followed throughout the nation's history.[12/]

12/ Whether pursuant to questions asked by marshalls who personally visited all residences in their districts in order

(footnote continued)

The lower court concluded that if the conditions set forth in his decision memorandum were fulfilled, the Secretary's 1989 decision to apportion overseas employees would not have been arbitrary or capricious. J.S. App. 76a. But one condition was never met: in December 1989, the Department of Defense abruptly cancelled its promise to conduct an actual enumeration of its overseas employees. As the lower court noted, this removed the sole factual basis for the Secretary's decision. Id.

Following the cancellation of the DOD's planned enumeration, Joint App. 184 (Stip. 46), the Secretary could no longer carry out an actual survey of the vast percentage of overseas employees. Instead, in order to apportion at all, the Census Bureau would have to rely on the administrative data in the DOD's personnel files which it had previously been found to

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(footnote continued)

to conduct enumerations in censuses before 1970, or pursuant to questionaires prepared after the mail-out, mail-back procedures were adopted for the 1970 census (see Borough of Bethel Park v. Stans, 319 F. Supp. 971, 975 (W.D.Pa. 1970), aff'd 449 F.2d at 575), the decennial census has since 1790 been conducted by an actual enumeration. Accord Tucker v. United States Department of Commerce, (7th Cir. March 16, 1992) (LEXIS, Genfed library, Courts file) (hereinafter "Tucker"), at Lexis p. 3 ("[t]he decennial census is a headcount rather than an estimation based on sampling"). The single instance in the history of the decennial census where an actual enumeration was not conducted was the count of overseas military personnel in 1970.

be unreliable.[13/]

The Secretary's first alternative was to base apportionment on file data concerning employees' "last six months U.S. address." Joint App. 136, 139, 187 (Stip. 47). A.R. 832. This choice was not entirely unreasoned, because the DOD had stated that it could produce data on last six months U.S. address that would be superior in quality to its home of record data, and because the Census Bureau considered "last six months" data to be more closely analoguous to the usual residence of overseas employees than their homes of record. Joint App. 136. A.R. 832. However, as with the DOD's planned enumeration, the Secretary's decision to apportion based on last six months U.S. address was nullified when the DOD informed the Census Bureau in the summer of 1990 that it could not in fact assemble such data for its overseas employees.

Joint App. 157-58, 184 (Stip. 48).

13/ For the first time in support of her motion for reconsideration below, the Secretary suggested that use of administrative data may even have been preferable to the DOD carrying out its planned enumeration. Her basis for this suggestion is the fact that the DOD's enumeration was designed to ascertain a person's last residence in the United States of six months or more in duration. J.S. 27. As a result, persons were likely to have been counted in the state of the military base to which they were assigned, rather than a state for which, the Secretary argued, they had a "permanent affinity." Id. The Secretary's argument ignores the fact that usual residence at the time of the census, and not state of "permanent affinity," is how all of the civilian and military inhabitants of the United States have been apportioned since 1790. Joint App. 174-75 (Stips. 8, 9), 200, 222.

At this point, the Secretary's remaining choices among DOD file data were: (1) the employee's last duty station in the United States, (2) the state the employee designated as his or her legal residence, or (3) home of record. Joint App. 143.[14/] The Secretary ultimately selected federal employees' "homes of record" as the basis for apportionment. Joint App. 185 (Stip. 50).

Home of record data may seem at first view to be a reasonable choice, since it ostensibly reflects an employee's designation of the place that he or she considered his or her permanent home upon entering military service. However, the reality, as shown by the Administrative Record, is quite different, and explains why the Census Bureau characterized the proposed use of such data as "arbitrary."

First, the DOD testified to Congress as recently as September 9, 1989 that its "home of record" data "has a high error rate." A.R. 740.[15/] The DOD also testified that its home of record for employees might be a place where the employee had not lived for many years and, in some cases, where the person had never lived. Id. This was partially due to the fact that soldiers establish their home of record at the time of enlistment, and cannot change it until they break their military service. Joint App. 147 n.5.

A 1976 study by the federal Advisory Commission on Intergovernmental Relations also revealed that some military personnel selected as their home of record a state with low or no income taxes rather than their "true" home state. Joint App. 55, 61, 180 (Stip. 29). A.R. 83, 100. J.S. App. 77a. It is significant, in this context, that the state of Washington has no income tax, while Massachusetts is one of the 45 states that do. See The Book of the States (1990-91 ed.) 313. This fact alone may explain why the DOD's data on home of record of its employees had a very different distribution between Washington and Massachusetts than their domestic populations. As noted, the imbalanced distribution of "homes of record" caused Massachusetts to lose its eleventh seat in Congress.

14/ Since amicus Washington state has argued that the lower court's decision somehow impairs the absentee voting rights of overseas employees, it is worth noting that the Secretary apparently never considered apportioning overseas employees to the state in which they had registered to vote. See 42 U.S.C. § 1973ff (specifying criteria for absentee voting which are inconsistent with "home of record"). As a result, at least some overseas employees were undoubtedly assigned in 1990 to states other than those to which they had declared their electoral allegiance.

15/ The DOD's August 1, 1989 congressional testimony to the same effect is reproduced in the Joint Appendix at page 124. See also Joint App. 183 (Stip. 43).

J.S. App. 183 (Stip. 42).[16/]

The Defense Department also testified to Congress that home of record data in its personnel records was missing for approximately 10% of its active force. Joint App. 131. A.R. 581. No home of record data at all was available for the DOD's civilian employees. Id. J.S. App. 67a. Many of these facts had been cited by the Secretary during the 1980s as reasons for opposing apportionment based on home of record. See generally Joint App. 55, 62, 79-80, 136. A.R. 37, 41, 43, 83, 832, 857.

These facts clearly support the lower court's conclusion that there was no rational connection between the facts the Secretary found and the choice he made in 1990 to apportion overseas federal employees to states based on home of record file data. J.S. App. 77a-78a, quoting Motor Vehicle Manufacturers Association, Inc., 463 U.S. 29, 43 (1983). An agency's decision may be found arbitrary and capricious if it rests on invalid data. Id. at 75a, citing City of Stoughton v. United States Environmental Protection Agency, 858 F.2d 747, 750 (D.C. Cir. 1988).

Moreover, there is no evidence at all in the record to suggest that the Secretary took any steps to cure the deficiencies in home of record data about which the DOD testified in September of 1989. J.S. App. 77a. Rather than addressing the deficiencies in the data itself, the Census Bureau in 1990 merely established a procedure to attempt to fill the gaps left by the 10% of the DOD's active overseas force and the thousands of the DOD's overseas civilian employees for whom no home of record existed. J.S. 10, 27.[17/] As the lower court noted, however, the fact that the Secretary used other, even less appropriate, data for the many

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16/ For the first time on a post-judgment motion for reconsideration, the Secretary attempted to renounce the Department of Commerce's earlier concurrence with the results of the 1976 Commission study. The Secretary now claims to have discovered that the DOD does not actually use its home of record data to calculate its employees' taxes. Regardless of whether this is true, if both the Census Bureau and a federal commission believed that home of record information was used to determine an employee's state tax liability, then certainly the enlistees who provided such information could be similarly misled. Thus, the study's conclusion that many persons in fact choose their home of record based on tax considerations is not undermined, whether or not the strategy actually was successful in lowering enlistees' taxes.

17/ For those active force employees for whom home of record data was not available, the Secretary first attempted to include them in the apportionment counts based on their legal residence (i.e., tax residence). J.S. App. 67a. Joint App. 186 (Stip. 56). This data element again suffered from the problem of persons choosing a low or no-tax state to claim as a legal residence. Joint App. 151. For the members of the DOD's active force for whom neither home of record nor legal residence data was available, last duty station was used. J.S. App. 67a. Joint App. 186 (Stip. 56). Even after the above procedures were undertaken, there still remained 1,846 members of the active force for whom no home state could be determined at all. Id.

The DOD did conduct a survey of its civilian employees. However, only 20% of the 61,205 persons who were sent questionaires ever returned them; 80% did not. Joint App. 185-87 (Stips. 54, 57). J.S. App. 67a. In the domestic census, persons who do not respond to the ennumeration survey are personally visited by census takers. Tucker, supra, Lexis p. 3. But there is no evidence that such follow-up procedures were even attempted for the DOD's overseas civilian personnel.

DOD employees who had no home of record at all, did not "alchemize" the home of record data that did exist into reliability. J.S. App. 89a. The lower court's conclusion is reinforced by the fact that DOD itself concluded in its September 1989 testimony that none of the three data elements that were utilized by the Secretary for apportionment in 1990 (see supra at 24) "meets a reasonable test of validity for apportionment purposes." A.R. 739. Accord Joint App. 124, 183 (Stip. 44).[18/]

Notwithstanding the belated justifications which the Secretary may offer for her predecessor's decision, the administrative record contains nothing more than post-hoc, conclusory justifications for a decision already made. No such justifications can explain away the lower court's conclusion that the use of home of record data -- proven unreliable by the 1970 census, continually desribed as arbitrary and inadequate during the intervening 20 years by both the DOD and the Census Bureau, and not improved qualitatively in any way -- was arbitrary and capricious.

18/ It should be noted that similar gap-filling procedures were utilized in the 1970 overseas apportionment (Joint App. 179-80 - Stip. 28), but the use of such procedures did not alter the Secretary's conclusion that the results of the 1970 apportionment were too arbitrary to repeat in 1980. J.S. App. 64a, 78a.

B. The Secretary's Failure To Consider Returning To Historic Practice Was Arbitrary And Capricious.

After the factual basis for the Secretary's 1989 decision to apportion -- the planned DOD enumeration -- disappeared, the Secretary had, at the least, an obligation to consider the relevant alternatives and give a reasoned explanation for whatever new decision he reached. Motor Vehicle Manufacturers Association, Inc., 463 U.S. at 43. One obvious option was to return to the historic practice of not apportioning persons living overseas. However, there is no indication in the administrative record that the Secretary even considered this alternative. J.S. App. 79a. Rather, having made an irreversible "commitment" to certain members of Congress, see supra at 12, the Secretary felt constrained to apportion overseas federal employees, despite the disappearance of the key factual premise on which his 1989 decision had been based.[19/]

19/ The "growing bipartisan concern" cited by the Secretary in his 1989 decision memorandum and referred to by the lower court as the political factor behind the Secretary's initial decision to apportion, J.S. App. 66a, as reflected in the administrative record, amounted to little more than letters from individual members of Congress and floor statements made by many of the same persons. Congress has never enacted any legislation on this topic. Joint App. 180-81 (Stips. 33, 37). In I.N.S. v. Chada, 462 U.S. 919 (1983), this Court made clear that in order for Congress to speak authoritatively, it must do so through legislation passed by both Houses and approved by the President. Id. at 954-958. The lower court repeated this

(footnote continued)

Thus, rather than considering a return to historic practice, the Census Bureau ultimately relied on precisely the same data it had consistently found to be too unreliable to use for apportionment. The process by which the Secretary arrived at his ultimate decision cannot be described as a reasoned analysis, and was therefore arbitrary and capricious.

II. THE DECISION TO APPORTION OVERSEAS FEDERAL EMPLOYEES BASED ON HOME OF RECORD DATA VIOLATES THE CONSTITUTION.

The lower court decided this case on statutory grounds, and therefore did not reach the issue of whether the Secretary's decision to apportion overseas employees based on home of record file data violated the Constitution.[20/] See Edward J. De Bartolo Corp. v. Florida Gulf Coast Building and Trades Council, 485 U.S. 568, 575 (1988). In 1988, however, after a careful review of the legislative history of the Fourteenth Amendment, the Justice Department concluded that:

(footnote continued)

Court's admonition against being too "quick to infer a congressional mandate" from "inchoate legislative action," J.S. App. 74a (quoting Motor Vehicle Manufacturers Association, Inc., 463 U.S. at 45), and correctly ruled that these individual expressions of political concern were insufficient to support the Secretary's decision.

20/ The lower court expressed "skepticism" at the constitutional claim, J.S. App. 79a, but did not enter any final order on the issue, as it did concerning the constitutionality of the apportionment formula. J.S. App. 94a-96a.

> [T]hroughout the debates on section 2 of the Fourteenth Amendment, there seems to be a premise that the census would count inhabitants of the United States and not individuals who did not reside in one of the states. Accordingly, we entertain serious doubts as to the constitutionality of any legislation that would seek to include [overseas federal employees] for apportionment purposes.

Jt. App. 241. (emphasis added). The Secretary's decision to apportion overseas employees based on arbitrary home of record data did violate the Fourteenth Amendment, for the following reasons.

The Constitutional Language. The Apportionment Clause originally provided that the states' representation in the House should be based on an "actual Enumeration of ... their respective Numbers." U.S. Const., art. I, § 2. The express language of the original Apportionment Clause thus required that the apportionment of Congress be based on an actual enumeration of the population, that is, the type of "headcount" which the census has conducted of the domestic population, both civilian and military, for the past two hundred years. Tucker, supra at Lexis p. 3.

The Apportionment Clause does not require that apportionment counts be restricted to those persons who are physically present in a state on census day. Since 1790, for example, census authorities have consistently included travelers "occasionally absent" from their home in

apportionment counts. But it does require that persons counted for apportionment be current "inhabitants" of the states to which they are attributed. See Wesberry v. Sanders, 376 U.S. at 13-14.

The Fourteenth Amendment modified this language, adding the restriction that representation in Congress was to be based on "the whole number of Persons in each State." U.S. Const., amend. XIV, § 2. (emphasis added). The plain language of the Fourteenth Amendment thus restricts the Secretary's discretion to change the criteria for apportionment, and requires her to use a standard that apportions persons according to whether or not they are currently residing in a state as of the census date.[21/] See Richardson v. Ramirez, 418 U.S. 24, 54 (1974) (relying in part on the "express language" of the Fourteenth Amendment); Perpich v. Department of Defense, 496 U.S. 334, 110 S.Ct. 2418, 2422 (1990) (plain language of constitution is decisive.)

Legislative History and Contemporaneous Interpretation. The legislative history of these provisions furnishes an additional guide to interpreting their express language. See Richardson v. Ramirez, 418 U.S. at 54. In particular, the

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21/ The constitutional restrictions do not apply, however, to the many discretionary surveys and censuses which the Department of Commerce conducts, see 13 U.S.C. §§ 141 et seq., or to formulas for the distribution of federal funds. See Borough of Bethel Park v. Stans, 449 F.2d at 581 (federal funding counts and apportionment counts need not be identical).

debates leading to the adoption of the Fourteenth Amendment confirm that that apportionment counts must be based solely on the number of current inhabitants of each state.

As described supra at 2-4, the Framers' primary concern in mandating a national census was to insure that the population data upon which apportionment was based would be collected in a uniform and nonpolitical manner. Their intent, in other words, was that "Reapportionment [would] be taken out of politics." Cf. Montana, Slip Op. 24 n.45. As the Census Bureau has stated, the First Congress adopted the concept of "usual residence" in 1790 "to comply with the constitutional requirements." Joint App. 180 (Stip. 32). See United States v. Villamonte-Marquez, 462 U.S. 579, 585 (1983) (interpretations of the Constitution by the First Congress are considered particularly persuasive because it included many of the Framers). The usual residence rule has been the "guiding principle" of the decennial census for 200 years, in particular on the issue of counting overseas federal employees. Joint App. 173, 175, 177 (Stips. 4, 10, 18).

Because the usual residence of overseas employees is concededly their station abroad and not any state, Joint App. 174 (Stip. 8), they were not apportioned to states even in the early censuses in which they were counted in the overall population. If the usual residence rule were accepted as the Framers' contemporaneous interpretation of the Apportionment

Clause, therefore, the apportionment of persons abroad to states in 1990 would be plainly unconstitutional. This Court need not, however, go so far in order to decide this case.

The Fourteenth Amendment added new restrictions on congressional apportionment to the Constitution. As noted above, in the aftermath of the Civil War the states again confronted the issue of how to allocate representation in the House. The drafters of the Fourteenth Amendment first proposed to base apportionment on the number of "legal voters" or "citizens" in each state. J.S. App. 62a n.25. The New England states, however, had large numbers of aliens currently residing within their borders who had no permanent ties or official status, as well as large numbers of women and children, left behind by the pioneers, who could not vote. Proposals to base apportionment on concepts of citizenship or suffrage were therefore defeated, in favor of a criterion based solely on the number of persons who were currently residing within each state. Id.

On the specific question of how the Fourteenth Amendment should be applied to federal employees temporarily stationed outside the boundaries of any state, the conduct of the 1870 Census is highly significant. After the Civil War the South was occupied by tens of thousands of federal soldiers and civilian officials, almost all of whom came from northern states. R. Jones, Disrupted Decades: The Civil War and

Reconstruction Years, 418 (1973). Census authorities interpreted the Amendment, ratified only two years before, consistently with the usual residence rule, and apportioned northern troops where they were stationed at the time of the census, not to their states of origin. J.S. App. 62a. Census authorities did so even though the likely result would be to increase the representation of the readmitted southern states in Congress throughout the 1870s. The fact that federal census authorities applied the newly-ratified Amendment in a way that contradicted their natural inclinations is strong evidence of their contemporaneous understanding of the words "in each State."

Finally, for a full century after the ratification of the Fourteenth Amendment, from 1870 to 1970, census authorities did not apportion federal overseas employees back to states. This was the consistent practice even from 1900 on, when such employees were included in the total population of the United States. Joint. App. 177 (Stip. 18). In short, the plain language, legislative history, and subsequent administration of the census all establish that the Fourteenth Amendment was intended to limit state apportionment counts to current inhabitants.

The 1990 Apportionment. This Court need not, however, decide the precise meaning of the restrictions imposed by the Fourteenth Amendment, or conclude that it embodies the usual

residence rule, in order to decide this case. It is enough for present purposes to conclude that the particular method of apportionment that was selected in 1990 -- assignment of overseas employees to states based on unilaterally designated home of record file data -- fails to satisfy the constitutional requirement.

The 1990 Census did not assign overseas employees to states based on where they were actually residing as of the census date. Joint App. 174 (Stip. 8). Nor did it conduct any actual enumeration to determine the state in which employees currently resided or even the state they intend to make a permanent home in the future. Instead, the census chose to treat employees as though they currently resided in whatever state they had chosen to designate, for whatever reason, at the time of enlistment.

As noted above, these listings were often places which the employees had designated as home states simply to reduce their current taxes -- places where they had never actually lived and had no intention of ever living. Even if an employee's "home of record" had once been their home, it might well no longer have been accurate, since the DOD prohibits employees from changing their listed home of record until they leave the military or break their tour of service. Joint App. 147 n.5. Indeed, the agencies themselves had concluded that the DOD's home of record data was "arbitrary" (Census Bureau) and did not "meet a reasonable test of validity for apportionment purposes." (Defense Department) J.S. App. 77a.

In Carrington v. Rash, 380 U.S. 89 (1965), this Court held that the State of Texas could not mechanically and automatically treat military personnel as though they continued throughout their tour of duty to remain residents of the state they inhabited on the date of enlistment. Instead, this Court concluded, the Fourteenth Amendment requires a state to consider the current intentions of such personnel in determining where they actually reside. Id. at 95-96. If a state may not arbitrarily equate current residence with military personnel's actual home on the date of enlistment, then surely the federal government may not arbitrarily equate current residence with whatever "home of record" an individual might have designated, for whatever motive, at the time he or she first entered federal service.

In Carrington, it is true, the effect of the state's attribution was to disenfranchise persons who had later become residents of the state. Here, no such impact is demonstrable. But it is no better, from a constitutional perspective, to dilute the representation of an entire state and its people in the U.S. House of Representatives on the basis of an arbitrary home of record rule, than to improperly withhold the franchise from individuals on such a basis. Carrington may not directly control this case, but this Court would disregard its rationale if it were to uphold the constitutionality of the Secretary's arbitrary rule here.

Congress and its delegee, the Secretary, have some discretion to construe and apply the terms of the Fourteenth Amendment. But they may not act inconsistently with its express language, and, to the extent that any term is unclear, their construction must be consistent with the purpose of the Amendment, which was to restrict the criteria upon which apportionment could be based. The Secretary's use of home of record data in 1990 did not comply with the express words, contemporary interpretation, or consistent administration of the Fourteenth Amendment. It is therefore unconstitutional.

III. THE SECRETARY'S DECISION TO APPORTION OVERSEAS FEDERAL EMPLOYEES TO STATES IS SUBJECT TO JUDICIAL REVIEW.

A. The Decision Does Not Present A Non-Justiciable Political Question.

In her arguments to the court below, the Secretary raised the political question doctrine only as to the "apportionment formula" count of this case. See J.S. App. 24a n.12. Following the entry of judgment, however, the Secretary argued for the first time, in support of her motion for reconsideration, that the overseas employees claim also presented a non-justiciable political question. The three-judge court properly ruled that the Secretary had knowingly waived her political question defense as to the claims presented in this appeal. See J.S. App. 86a-87a. This Court should therefore not consider this argument.

Moreover, this Court has recently rejected the political question argument as it pertained to review of an apportionment formula claim. Montana, supra, at 14-17. The lower court noted in denying the Secretary's motion for reconsideration that her argument concerning the overseas employees claim was very similar to the argument she had advanced in the apportionment formula context. J.S. App. 86a. Accord Tucker, supra, Lexis pp. 12-14. It follows that, if considered at all, the Secretary's political question argument should be rejected for the reasons set forth in Montana.

B. The Secretary's Decision Is Reviewable Under The Administrative Procedure Act.

There is a "strong presumption" that Congress intends judicial review of administrative action. Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 670 (1986). "[O]nly upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." Abbott Laboratories v. Gardner, 387 U.S. 136, 141 (1967), quoting Rusk v. Cort, 369 U.S. 367, 379-80 (1962). See generally, Bowen v. Michigan Academy of Family Physicians, 476 U.S. at 670-73.

The Secretary argued below, however, that the decision to apportion overseas federal employees to states falls within the "narrow exception" for matters "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). Citizens to Preserve Overton

Park v. Volpe, 401 U.S. at 410. The Secretary also argued, for the first time in her motion for reconsideration, that the Census Act itself precludes judicial review under the APA. 5 U.S.C. § 701(a)(1). The lower court rejected both these arguments.[22/] J.S. App. 86a n.1.

1. **The Secretary's decision is not committed to agency discretion by law.**

In determining whether an administrative decision is committed to agency discretion by law, a court must ask whether there is a "meaningful standard against which to judge the agency's exercise of discretion." Webster v. Doe, 486 U.S. 592, 600 (1988), quoting Heckler v. Chaney, 470 U.S. 821, 830 (1985). With regard to the Secretary's decision to apportion overseas federal employees to states, a number of sources provide such a standard. Article 1, § 2, cl. 3 of the Constitution, as modified by the Fourteenth Amendment, requires an "actual Enumeration" of population every ten years in order to determine "the whole number of persons in each State" for purposes of apportioning Congressional seats (emphasis added).

22/ The lower court also cited ten federal court opinions holding that the decisions made by the Secretary of Commerce and the Census Bureau as to the conduct of the decennial census are subject to review under the arbitrary and capricious standard of the APA. J.S. App. 68a-69a. The only case suggesting otherwise, Tucker v. United States Department of Commerce, supra (see discussion at 44-45 n.26, infra), was decided after the three-judge court rendered its decision.

In conformance with the constitutional mandate, 13 U.S.C. § 141(a) requires that the Secretary "take a decennial census of population . . . in such form and content as he may determine . . . ," and Section 141(b) requires that the Secretary report the census results to the President. This permits the President to meet his statutory duty under 2 U.S.C. § 2a, to transmit "to the Congress a statement showing the whole number of persons in each state." (emphasis added) "Thus the discretion exercised by the Secretary, at least with respect to the apportionment counts, is cabined by a duty to take a census which produces a tabulation providing the whole number of persons in each state." J.S. App. 70a. The Secretary cannot persuasively argue that judicial review is unavailable to determine whether these requirements have been adhered to.

In reviewing this constitutional and statutory framework for purposes of determining whether there is a "judicially meaningful standard" to apply, the Court should be guided by familiar principles of statutory construction. Thus, the Court should accord weight to the statutory interpretation of the administrative agency charged with its enforcement. See Chemical Manufacturers Association v. Natural Resources Defense Council, Inc., 470 U.S. 116, 120 (1985). Since the first census in 1790, census authorities have interpreted the Census Act to embody the usual residence rule, namely, that persons

are to be counted where they are usually living and sleeping most of the time as of the census date. See supra at 5. As the contemporaneous, longstanding, and consistently applied administrative interpretation of the Census Act, the usual residence rule should be accorded particular weight. See Equal Employment Opportunity Commission v. Associated Dry Goods Corp., 449 U.S. 590, 600 n.17 (1981); Andrus v. Shell Oil Co., 446 U.S. 657, 667-68 (1980), and cases cited.[23/]

In addition to its usefulness as an aid to construing the Census Act, the usual residence rule independently contributes to the existence of a "meaningful standard for judicial review." See J.S. App. 70a. While in Heckler v. Chaney, 470 U.S. at 836, the Court left the issue open, the lower courts have properly concluded that "[j]udicially manageable standards may be found in formal and informal policy statements and regulations as well as in statutes." Padula v. Webster, 822

23/ It is of no significance that the explicit language of the First Census Act, which formed the basis for the usual residence rule, was deleted from the statute in 1850. The Act was extensively rewritten at that time in response to widespread dissatisfaction with the errors that had occurred in the 1840 census, as well as the desire to chronicle and support the growing industrialization of the nation. M. Anderson, supra, 33-36, 38-40. C. Wright and W. Hunt, supra, 38-41. Despite the changes, however, Congress' and census authorities' interpretation of the Act as embodying the usual residence rule did not change. In particular, as part of the 1850 reforms, census authorities supplied enumerators for the first time with a set of formal rules for counting the population. The usual residence rule was the first rule of enumeration. Joint App. 93.

F.2d 97, 100 (D.C. Cir. 1987). See also Vigil v. Rhodes, 953 F.2d 1225, 1230 (10th Cir. 1992); CC Distributors, Inc. v. U.S., 883 F.2d 146, 156 (D.C. Cir. 1989); Massachusetts Public Interest Research Group v. Nuclear Regulatory Commission, 852 F.2d 9, 16 (1st Cir. 1988). Cf. Service v. Dulles, 354 U.S. 363, 388 (1957). Indeed, a contrary doctrine, confining "judicially meaningful standards" to statutes and nothing more, would fail to account for the distinction between the "committed to agency discretion by law" provision of § 701(a)(2) and the "statutes preclude judicial review" provision of § 701(a)(1). See Webster v. Doe, 486 U.S. at 608 (Scalia, J., dissenting) (emphasis in original). See also Id. at 605 (O'Connor, J., concurring in part and dissenting in part). While application of the usual residence rule presents questions of interpretation in particular circumstances, see J.S. App. 60a-61a n.24, it is precisely the type of standard that courts apply routinely to specific sets of facts in deciding cases.

What the lower court described as "pragmatic concerns" also weigh in favor of reviewability and contribute to a meaningful standard for judicial review. J.S. App. 70a-71a, citing Levin, Understanding Reviewability in Administrative Law, 74 Minn. L. Rev. 689 (1990). In 1787, the Framers expressed grave concerns that if no constraints were placed on Congress' ability to reapportion itself, serious abuses would result. See supra, at

2-3. As the lower court noted, "[i]t is especially appropriate to have some review by the courts, as the disinterested branch of government, in order to insure a neutral process and safeguard the interests of the potentially disadvantaged in the conduct of the census." J.S. App. 71a.

In recent cases where this Court has found administrative decisions to be nonreviewable, fundamentally different pragmatic concerns have counseled against judicial review. Indeed, the Court's application of the "committed to agency discretion" exception has been narrowly confined to cases involving prosecutorial discretion, Heckler v. Chaney, 470 U.S. at 823,[24/] and situations which implicate national security concerns, Webster v. Doe, 486 U.S. at 592.[25/] See Diebold v. U.S., 947 F.2d 787, 790 (6th Cir. 1991) (citations omitted). By contrast, the pragmatic concerns in this case weigh heavily in favor of reviewability.[26/]

24/ Accord Interstate Commerce Commission v. Brotherhood of Locomotive Engineers, 482 U.S. 270 (1987); Southern Railway v. Seabord Allied Milling Corp., 442 U.S. 444 (1979); Morris v. Gressette, 432 U.S. 491 (1977).

25/ Accord Department of the Navy v. Egan, 484 U.S. 518 (1988).

26/ The one lower court opinion finding a decision of the Secretary concerning the census to be unreviewable, Tucker, supra, involved the question of whether the census should be statistically adjusted to compensate for undercounting. In contrast to the decision to apportion overseas federal employees, where the Constitution, statutes, and the usual

(footnote continued)

2. The Census Act itself does not preclude judicial review of the Secretary's decision.

There is no explicit language in the Census Act that precludes review of the Secretary's decision to apportion overseas federal employees to states. In light of the volume of litigation over census decisions in recent decades, see, e.g., 40 n.22, supra, Congress could have amended the statute to add an explicit prohibition on judicial review of census decisions if it wished to curtail such review. Thus, for example, the section of the Census Act which allows states to request data for redistricting from the Secretary, explicitly provides that the Secretary "shall have final authority for determining the geographic format of such plans." 13 U.S.C.

(footnote continued)

residence rule provide a meaningful standard against which to evaluate the decision, there exists no authoritative text, nor any longstanding and consistently applied practice, to rely upon in addressing the statistical problem of undercounting. Indeed, awareness of the problem of undercounting did not even develop until relatively recently with the advent of modern computer technology.

Moreover, the highly technical nature of the undercounting problem makes a judicial resolution much more difficult to achieve than with the clear issue of whether to apportion overseas employees. In the circumstances of Tucker, the decision whether to adjust statistically for census undercounting presented a problem of technical methodology that may have lacked a judicially meaningful standard for review, but the catagorical decision to apportion overseas federal employees to states does not.

§ 141(c) (emphasis added).[27/] See McNary v. Haitian Refugee Center, Inc., 111 S.Ct. 888, 897 (1991). Alternatively, Congress could have included the Secretary's functions under the Census Act among the list of functions and statutory provisions which are explicitly excluded from coverage of the APA. See 5 U.S.C. § 551(H).

Nor is this one of the very rare cases in which the factors cited in Block v. Community Nutrition Institute, 467 U.S. 340, 345 (1984), indicates "clearly and convincingly" a Congressional intent to preclude review of the Secretary's decision to apportion overseas federal employees to states. Compare Bowen v. Michigan Academy of Family Physicians, 476 U.S. at 470-73.

The Secretary seeks such an implicit intent to preclude review, first, in 2 U.S.C. § 2a's requirement that the President "transmit" to Congress a statement showing the whole number of persons in each state (as calculated by the Secretary), and the number of Representatives to which each state would be entitled under the mathematical formula contained in the statute. J.S. 22. It is unclear, however, why this ministerial function on the part of the President should be viewed as indicating a clear legislative intent to shield the Secretary's decision to apportion from judicial review.

27/ This Court has found, however, that even such apparently explicit provisions do not preclude all judicial review. See Shaughnessy v. Pediero, 349 U.S. 48 (1955); Harmon v. Brucker, 355 U.S. 579 (1958).

To the contrary, the legislative history of the Census Act clearly demonstrates that the President's role in the statutory scheme was intended to have no substantive content. As stated in the report of the Senate Committee on Commerce which accompanied the bill that added 2 U.S.C. § 2a to the statutes at large, the President's only role under the provision is to report "upon a problem in mathematics which is standard, and for which rigid specifications are provided by Congress itself, and to which there can be but one mathematical answer." S. Rep. No. 2, 71st Cong., 1st Sess. 4-5 (1929).[28/]

In light of the purely ministerial nature of the President's role, and the fact that plaintiffs challenge no decision of the President, the fact that the President appears in the statutory scheme does not suggest a congressional intent to preclude judicial review of the Secretary's decision. Contrast Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103 (1948) (Presidential approval required for Civil Aeronautics Board to grant authority to

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28/ Congress' intent as to the President's role was further clarified during debate over the bill, when its author, Senator Vandenberg of Michigan, stated:

> In my judgment and I believe as a matter of indisputable fact, that any function served by the President is as purely and completely a ministerial function as any on earth could be. 71 Cong. Rec. 1858 (1929). See also Id. at 1613 (remarks of Sen. Vandenberg).

engage in overseas air transportation).[29/]

The time frame for the conduct of the decennial census and subsequent reapportionment also fails to show a congressional intent to preclude judicial review. J.S. 23. The two and one-half years between the census date and the first congressional election of the succeeding decade provide ample time to conduct the minimal judicial review contemplated by the APA.[30/] Since APA claims are confined to the administrative record, Camp v. Pitts, 411 U.S. 138 (1973), judicial review can be had on an expedited basis. Indeed, in this case, less than six months will have elapsed between the filing of dispositive motions in the lower court (November 5, 1991) and argument in this Court (scheduled for April 21, 1992). Joint App. 10-11. Of course, if Congress wished to speed the process of judicial review, it could impose a deadline within which challenges to census decisions would have to be filed, for example, 30 or 60 days after release of the state population counts, as is

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29/ Nor can a congressional intent to preclude judicial review be inferred from the fact, emphasized by the Secretary, that she is not required to publish the tabulations of population by state. J.S. 23. While an absolute preclusion of disclosure of the state population figures might tend to indicate such an intent, any member of the public may obtain the figures at issue in this case through the Freedom of Information Act, 5 U.S.C. § 552. Moreover, the Secretary was required to transmit the 1990 state population counts to other officials in government. See, e.g., 42 U.S.C. § 10403(b).

30/ Using the 1990 census as an example, this period runs from the census date, April 1, 1990, to the Congressional election, November 3, 1992.

done in other statutes (see, for example, 28 U.S.C. § 2344), and could require expedited hearings in the lower courts.

The cases relied upon by the Secretary in support of her argument that the statutory time frame precludes review are also inapposite. J.S. 24. Rather than focusing on timing issues, Morris v. Gressette, 432 U.S. at 491, and Southern Railway v. Seabord Allied Milling Corp., 442 U.S. at 444, involved administrative decisions not to enforce, where, as pointed out above, this Court has found agency discretion to be the greatest. See supra at 44. Moreover, in both Morris and Southern Railway, even if judicial review were not available under the particular provision at issue, court review of the same question was nevertheless available through other means. See Morris, 432 U.S. at 505;[31/] Southern Railway, 442 U.S. at 444. Accord American Bank, N.A. v. Clarke, 933 F.2d 899 (10th Cir. 1991).

By contrast, if the plaintiffs here cannot obtain judicial review of the Secretary's decision for arbitrariness under the APA, it is unlikely that such review will be available at all. This Court has rejected arguments that would preclude all

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31/ The Court in Morris also focused on the "unusual" and "severe" nature of the remedy in the event that the Attorney General did object, which was to suspend implementation of validly enacted state legislation, and what the majority viewed to be clear legislative history that the Attorney General's failure to object was not subject to review. Id. at 504.

judicial review of questions as significant as the regularity of the conduct of the decennial census. See McNary v. Haitian Refugee Center, Inc., 111 S.Ct. at 898; Bowen v. Michigan Academy of Family Physicians, 476 U.S. at 670. See also Save the Bay, Inc. v. Administrator of E.P.A., 556 F.2d 1282, 1296-97 n.15 (5th Cir. 1977).[32/]

Finally, the fact that census counts are reported to Congress does not indicate an intent that the Secretary's decision be unreviewable. J.S. 24. While it is true that Congess can enact legislation that would moot any judicial review of the Secretary's decision, this is true of virtually every administrative decision. Moreover, the history of the modern Census Act demonstrates vividly that Congress itself has recognized its own inability to deal effectively with census and apportionment matters. The adoption of the automatic apportionment procedure in 1929 was a direct result of Congress' inability to pass any apportionment law following the 1920 census. Montana, supra, at 8. J.S. App. 35a. M. Balinski and H.P. Young, Fair Representation: Meeting the Ideal of One Man One Vote 56 (1982). As the law's author, Senator Vandenberg, stated in debates leading to the enactment of the statute:

32/ Even in Block v. Community Nutrition Institute, although the Court ruled that judicial review of the Secretary's decisions under the statute at issue was not available to consumers, it noted that handlers (whose interests were considered to parallel those of consumers) could still obtain such review. 467 U.S. at 352.

> I submit that the experience of the past eight years proves that this problem can not be left wholly to Congress . . . [W]e have reached the point where it no longer is safe or possible, as demonstrated by the last eight years of constitutional trespass, to leave the problem wholly to the voluntary instincts and attitudes of Congress itself.

71 Cong. Rec. 1611-12 (1929). These comments are strikingly similar to those of the Framers, who concluded in 1787 that reapportionment was too significant to leave to the sole discretion of Congress, see supra at 2-3, and confirm the need for judicial review of the conduct of the apportionment census.[33/]

IV. THE ORDERS ENTERED BY THE DISTRICT COURT WERE PROPER.

A. Remand Was Neither Required Nor Appropriate in the Circumstances of this Case.

In most instances in which a court finds that an official has acted arbitrarily or abused his discretion, a remand to the agency for further consideration is the proper remedy. In

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33/ Indeed, the experience of the one instance of Congressional action since the enactment of the statute bore out Senator Vandenberg's fears. When under the 1940 census the method of equal proportions would have yielded an additional seat to Democratic Arkansas, but the method of major fractions would have given that seat to Republican Michigan, the Congress voted along purely partisan lines to give the seat to Arkansas. Montana, at 23 n.42. It is precisely such partisan politics that the Framers sought to avoid in 1787 when they determined that a neutral, apolitical census should form the basis for reapportionment. See supra at 3-4.

certain circumstances, however, remand may not be appropriate. In Florida Power and Light Co. v. Lorian, 470 U.S. 729, 744 (1985), for example, this Court noted the presumption in favor of remand, but recognized that exceptions could be made in rare circumstances. Cf. NLRB v. Wyman-Gordon Co., 394 U.S. 759, 766-67 n.6 (1969). This is one of those cases in which a remand would serve no useful purpose, and would in fact cause irremediable harm.

In making its decision as to remedy, the three-judge panel stated that it was "intensely aware that the practical process of reapportionment following the 1990 census has been going on for over a year." J.S. App. 82a. In these circumstances, the court concluded, further delay was intolerable and would cause serious harm to the prevailing parties, the Commonwealth of Massachusetts and its voters. J.S. App. 91a. In particular, the uncertainty over whether Massachusetts would retain its existing number of seats in Congress, and therefore over the boundaries of congressional districts, was causing serious disruption in the efforts of candidates (particularly challengers to incumbents) to mount campaigns and comply with state nominating requirements. See Affidavit of William P. Lee, ¶¶ 3, 4.[34/]

34/ The Lee Affidavit was first submitted with Massachusetts' Opposition to Application for Stay and is on file with this Court. The lower court was aware of the essential facts set forth therein because of the pendency of redistricting litigation. See J.S. App. 83a n.32.

Even more importantly, there could not now be a genuine reconsideration. The decennial census is not a continuing process, but rather is intended as a "snapshot" of the American population as of the April 1 census date. 13 U.S.C. § 141(a). The 1990 census occurred two years ago. Many defense department employees who could have been surveyed in 1990, or whose personnel records might have been corrected at that time, have left the military. As the Secretary recognized, after the DOD cancelled its planned enumeration, the only possible method of apportioning overseas employees was to rely on data in DOD's files. As the Census Bureau's analysis showed, there were only three types of file data available: last U.S. six months residence, legal residence, and home of record, Joint App. 143, and all three were unreasonable (DOD) or arbitrary (Census Bureau) bases for apportionment. J.S. App. 77a. There is no longer any way to reconstruct the past so as to create a better method.

The passage of time has thus eliminated all options other than returning to historic practice. Since all of the parties had stipulated as to how the census totals should be adjusted if Massachusetts prevailed, the court reasonably concluded that equitable considerations required immediate action. J.S. App. 82a.

In deciding not to remand, the court also cited the strong evidence that the Secretary would not reconsider his decision

even if given the opportunity to do so. See supra at 11-13. As the court found, after the factual premise for his policy reversal disappeared, "there is no evidence that the Census Bureau considered reverting to its prior policy . . . Instead, responding to what appear to have been inertial forces which did not permit even thinking about turning back once the policy reversal had been announced," the defendants refused to reconsider their decision to apportion. J.S. App. 76a.

The district court did not rely solely, however, on the absence of any evidence of reconsideration in the administrative record. At oral argument, the court pressed the issue, asking counsel whether, apart from the record, there was any indication that the Secretary had ever considered his other policy options. As the court noted, however, "counsel for the defendants contended that the Secretary, once having made the policy choice on the basis that home of record information would not be used, was somehow committed to using that information when the underlying factual assumption became obsolete . . . ." J.S. App. 78a. Indeed, as set forth supra at 12, the Justice Department stressed to the court that the Secretary's "commitment" was irreversible and precluded him from exercising independent judgment and reconsidering the policy even after the factual assumptions on which it was based disappeared.

In selecting a remedy, the three-judge panel was entitled to rely on the factual representations made to it by counsel. This is particularly true where, as here, the Justice Department's representations were reaffirmed, id., and confirmed what the court had already found in the Administrative Record: complete intransigence and refusal on the part of the agency head to consider an important policy option.

In similar circumstances, other federal courts, applying the Lorion standard, have also found that remand to an agency for reconsideration would be futile. See, e.g., We Who Care, Inc. v. Sullivan, 756 F. Supp. 42, 47 (D.Me. 1991) (holding that an administrator acted arbitrarily, but declining to remand, on the ground that to do so would be "futile and inappropriate"); Glaxo Operations UK Ltd. v. Quigg, 706 F. Supp. 1224, 1226 (E.D.Va. 1989), aff'd 894 F.2d 392 (Fed. Cir. 1990).

Indeed, in the closely-related area of administrative exhaustion, this Court recently held that while federal courts must ordinarily defer to the administrative decisionmaking process, deference is not required in certain circumstances. In McCarthy v. Madigan, ___ U.S. ___, 112 S.Ct. 1081 (1992), the Court permitted a prisoner alleging improper deprivation of medical care to avoid the prison system's adjudicatory procedures and sue directly in federal court. Id. at 1092. In

doing so, the Court noted that separation of powers principles ordinarily require that courts allow an agency to make decisions in the area committed to it by Congress and "to correct its own mistakes," id. at 1086, but that this presumption should not be applied when "a particular plaintiff may suffer irreparable harm if unable to secure immediate judicial consideration of his claim" or the agency has "predetermined the issue before it." Id. at 1087-88 (citing prior decisions).

This Court has also cautioned that "cases arise where a claimant's interest in having a particular issue resolved promptly is so great that deference to an agency's judgment is inappropriate." Bowen v. City of New York, 476 U.S. 467, 483 (1986), citing Mathews v. Eldridge, 424 U.S. 319, 330 (1976). This is especially true where, as here, it is unlikely that the plaintiff will be able to obtain an openminded review from the agency. See, e.g., Bowen, 476 U.S. at 485 (where agency is likely to adhere to prior policy due to external pressure, there is nothing to be gained by returning the issue to it for consideration); Houghton v. Schafer, 392 U.S. 639, 640 (1968) (referral is not required where an official has prejudged an issue, so that to do so would be "a futile act.")

The three-judge panel in this case found both that the plaintiffs would suffer serious and irreparable harm if judgment were delayed, and that the Administrative Record,

supplemented by the defendants' representations to the court, made it clear that they refused to consider the option of returning to historic census policy. In these exceptional circumstances, the district court correctly concluded that a remand would be a futile gesture, and would cause irreparable harm to Massachusetts citizens.

B. Even If this Case Is Remanded, the Lower Court's Orders Should Remain in Effect.

Even if remand were the proper remedy, it does not follow that the lower court's orders should be vacated. This Court should, as a condition of remand, vacate the Secretary's decision. See, e.g., Federal Power Commn. v. Texaco, Inc., 417 U.S. 380, 401 (1974) (vacating agency decision as a condition of remand); Camp v. Pitts, 411 U.S. at 143 (same).

Any reapportionment of Congress must be based on accurate data which is assembled according to legal process. If this Court vacates the Secretary's decision, it follows that his reported results, based on arbitrary data, may not stand. In fact, as the parties have stipulated, the erroneous data affects the apportionment of only a single seat in Congress, involving Massachusetts and Washington. Joint App. 183 (Stip. 42). With the vacation of the Secretary's decision, the apportionment of that one seat is therefore invalid.

Foreseeing the possibility of periods in which a reapportionment temporarily would not be effective, Congress has provided in the reapportionment statute, 2 U.S.C. § 2a(b), a procedure for such situations. Section 2a(b) states in relevant part that "Each State shall be entitled . . . until the taking effect of a reapportionment under this section or subsequent statute, to the number of Representatives shown in [its last reapportionment certificate]. . . ." Applying this rule, Washington and Massachusetts should, until the Secretary has reached a new, valid decision concerning the inclusion of overseas employees in apportionment counts and has reported the results, revert to the number of seats that each state was awarded in the 1980 reapportionment: eight and eleven respectively. The court's orders achieve this result. Whether the lower court's reasoning or the mechanism of Section 2a(b) is followed, therefore, the result should be the same: pending a reconsideration and the results of a valid method of apportionment by the Secretary, Massachusetts and Washington's congressional representation should remain at the same level as it has been for the past decade.

C. The Court's Orders Do Not Intrude on the Interests of the States or the Census Generally.

The appellants have contended that the Final Orders of the District Court would disrupt the "settled expectations of the

states," Application for Stay at 2, force the Secretary to "revise the 1990 census tabulations for every state," id., and require 922,810 persons to be "thrown out of the underlying census count." Id. J.S. at 15. As a review of the Final Orders and Decrees will show, this is simply not true.

The Final Decrees and Orders of the three-judge court require the Secretary simply to "submit...a statement showing the number of Representatives to which each state would be entitled...."[35/] J.S. App. 83a. There is no order requiring recomputation of underlying census totals or "throwing" any person out of the count. In fact, the Secretary need not recompute census totals at all, since the parties stipulated in advance that the only impact of a decision in favor of the plaintiffs would be that Massachusetts would retain the 435th seat awarded in the census, which otherwise would go to Washington state. Joint App. 183 (Stip. 42). The parties below agreed that the other 48 states would not be affected by a decision in favor of Massachusetts.

Despite the fact that the lower court's Final Orders plainly require no recomputation of underlying census counts, the appellants may suggest that they do. The apportionment census has no necessary relationship, however, to the many

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35/ The court clearly had the legal authority under Section 706 of the APA to enter such an order against the Secretary, and the appellants do not appear to contend otherwise.

surveys which the Commerce Department conducts under statutory authority. See, e.g., 13 U.S.C. §§ 161, 181. Thus, for example, the Department's mid-decade census is to be conducted "without regard to" the decennial census and "not used for apportionment." 13 U.S.C. § 141(d) Nothing requires that the constitutional and discretionary surveys be conducted in the same manner, and in fact they are not. See, e.g., Borough of Bethel Park v. Stans, 449 F.2d at 581 (inclusion of persons in state apportionment counts does not require that they also be included in municipal figures). There is thus no reason for concern that the decision in this case will affect the 1990 census totals or federal benefit programs generally.

D. The Court's Orders Do Not Intrude on the Authority of the President.

The Secretary also stressed in her Jurisdictional Statement that the lower court's orders allegedly intrude into the authority of the President. J.S. at 28. This, too, is inaccurate. The President's role in the reapportionment process is simply to "transmit" the results computed by the Secretary to the Clerk of the House. The legislative history of 2 U.S.C. § 2a makes clear that Congress had no intention of conferring any discretionary authority on the President to change census results. See supra at 47 n.28. The President's role in transmittal is thus wholly ministerial.

Since at least Kendall v. United States, 37 U.S. (12 Pet.) 524 (1838), this Court has distinguished between the discretionary and ministerial roles of executive officials including the President, suggesting that while the courts should not order an executive official to take discretionary action, the same rationale does not apply to purely ministerial actions. Id. at 610 ("The mandamus does not seek to direct the postmaster general in the discharge of any [executive] duty . . . but to enforce the performance of mere ministerial act, which neither he nor the President had any authority to deny or control." (emphasis added) See Mississippi v. Johnson, 71 U.S. 475, 498 (1866). Although this Court has not squarely confronted the question, but cf. United States v. Nixon, 418 U.S. 683, 706 (1974), lower courts have applied the reasoning of Kendall to conclude that the judiciary may compel a President to perform a purely ministerial act. National Treasury Employees Union v. Nixon, 492 F.2d 587, 616 (D.C.Cir. 1974).36/

Although this Court might elect to remand this issue to the lower court in the expectation that the Office of the President

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36/ In her Jurisdictional Statement, the Secretary cited a lower court holding that the President is not subject to the APA. J.S. 22. See Armstrong v. Bush, 924 F.2d 282 (D.C. Cir. 1991). This is irrelevant, however, since no action or omission by the President or his staff has ever been called into question or otherwise put at issue in this litigation. The President played no apparent role in the decision to apportion overseas employees to states, and the Secretary did not cite any evidence to the district court that he did.

will promptly transmit revised census results sent to it by the Secretary, id., the courts may, if necessary, issue orders to the President to carry out a ministerial act. See, e.g., Powell v. McCormack, 395 U.S. 486, 550 (1969).[37/]

E. The Court's Orders Do Not Intrude on the Authority of Congress.

The appellants likewise complain that the lower court's order to the House Clerk to issue revised certificates of entitlement to Washington and Massachusetts, in accordance with the revised results reported by the Secretary, intrudes on the authority of Congress. J.S. at 24. However, as the Secretary has recognized, under the provisions of 2 U.S.C. § 2a, "the Clerk performs only the ministerial task of notifying the States of the number of representatives to which they are entitled under the President's statement." Brief of U.S. Dept. of Commerce in Montana, at 33 n.27. If there were any doubt on this point, it is confirmed by the fact that in the absence of the Clerk, this role is performed by the Sergeant-at-Arms or the Doorkeeper. 2 U.S.C. § 2a(b).

That a court may issue orders to compel the performance of ministerial acts by House officials is established by this

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37/ Massachusetts notes that, in compliance with statements by this Court suggesting that a party seeking even a less favorable judgment must cross-appeal, it has filed a Jurisdictional Statement which holds open the issue of remedy.

Court's decision in Powell v. McCormack, 395 U.S. at 486. Again, this Court might conclude that the House Clerk should be given a brief opportunity to comply with the decision in this case before an order issues against him, id. at 550, but there is no doubt of the federal courts' authority to compel action if necessary.

It should also be noted that the House Clerk agreed to be bound by any orders that the district court might enter in this case, and did not participate in the proceedings below. J.S. App. at 3 n.1. Nor did the other defendants below argue the issue of the court's authority over the House Clerk on his behalf. The district court was therefore fully justified in entering the order it did against him.

CONCLUSION

For these reasons, the decision of the district court should be affirmed.

Respectfully submitted,

SCOTT HARSHBARGER
ATTORNEY GENERAL
COMMONWEALTH OF MASSACHUSETTS

Dwight Golann

Dwight Golann*
Steve Berenson
Assistant Attorneys General
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2200, ext. 2068

*Counsel of Record

John P. Driscoll, Jr.
Edward P. Keibensperger
Neil P. Motenko
Special Assistant Attorneys General
Nutter, McClennen & Fish
One International Place
Boston, Massachusetts 02110
(617) 439-2000

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In the Supreme Court of the United States

OCTOBER TERM, 1991

BARBARA FRANKLIN, SECRETARY OF COMMERCE, ET AL.,
APPELLANTS

v.

COMMONWEALTH OF MASSACHUSETTS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

REPLY BRIEF FOR THE APPELLANTS

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

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The census was completed on December 26, 1990. The President transmitted the required statement to Congress on the apportionment of Representatives on January 3, 1991. The Clerk of the House of Representatives certified the number of Representatives to which each State is entitled on January 16, 1991. Most States have now completed redistricting, primary elections have taken place or are imminent, and the general election of Representatives and the President is less than seven months away. Yet litigation over the conduct of the 1990 census continues in this Court and in lower courts across the Nation. It is time for this Court to confirm what Congress specified in the Census Act: that the Secretary of Commerce should conduct the census "in such form and content as he may determine."

A. *Historical background.* In their opening brief, appellees attempt to establish an overall historical theme that is factually inaccurate, legally misconceived, and anomalous.

1. Appellees assert that, with the exception of the 1970 census, "census authorities have never counted persons living overseas on the census date as residents of particular states," and that "usual residence at the time of the census • • • is how *all* of the civilian and military inhabitants of the United States have been apportioned since 1790." Br. 2, 41-42 n.13.[1] Neither statement is true. For example, persons living overseas were counted as residents of particular States at least in the following instances, in addition to the 1970 census (see Gov't Br. 4-5 & n.1):

- The 1900 instructions specified that military and civilian personnel "at a station at home or abroad" should be counted at their family home in the United States, "even though • • • absent on duty at the time of the enumeration."
- Instructions from 1870 to 1920 specified that seafarers were to be counted "at their land home, no matter how long they may have been absent."
- Instructions from 1910 to 1940 specified that citizens "abroad temporarily at the time of the enumeration" should be counted at their family home in the United States, adding that "[i]t does not matter how long the absence abroad is continued, provided the person intends to return to the United States."

In fact, in 10 of the past 13 censuses, the enumerators' instructions have expressly provided for including certain persons outside the United States for extended periods in the apportionment counts. *Ibid.*[2]

[1] Citations are to the printed version of appellees' brief.

[2] Appellees' mistaken characterization of history stems from a misreading of Stipulations 26 and 28 (J.A. 179-180.) Stipulation 26

Appellees' statement that usual residence is how "*all*" inhabitants have been apportioned since 1790 is no more accurate. For example, in addition to the foregoing specific rules for apportioning those abroad (see Gov't Br. 4-5 & n.1):

- Boarding school students are counted not where they live and sleep most of the time, but at their parents' home.
- College students were counted not where they lived and slept most of the time, but at their parents' home, from 1900 through 1940.
- Members of Congress may be counted in their home districts, even though they live and sleep most of the time in or near the District of Columbia.
- Again, the 1900 instructions specified that federal personnel should be counted at their family home, even if living or sleeping at a station at home *or* abroad.

Indeed, the Census Bureau policy paper on which appellees rely in other contexts expressly states that "[t]he adoption of usual residence as the main residency rule

states only that "[t]he 1970 and 1990 censuses are the only times that the Census Bureau has included, *as a separate group*, counts of overseas Federal employees living in foreign countries on the census date in the population counts used for purposes of congressional apportionment." J.A. 179 (emphasis added). In other words, only in 1970 and 1990 were overseas personnel separately counted based on their status as stationed abroad, and those counts apportioned based on home of record (or backup data). In 1900, by contrast, military or civilian employees abroad were included in the apportionment count through the regular conduct of the census in the United States, as members of a family in the enumerator's district. Stipulation 28—the other portion of the record cited by appellees—simply describes the circumstances of including federal personnel stationed abroad in state apportionment counts in 1970, without stating that it was unprecedented to do so. J.A. 179-180. The passage in the district court's opinion cited by appellees (J.S. App. 64a) makes these same points, and, like appellees, does not mention the 1900 instructions.

for 1990 does not mean that the Census Bureau will not modify that rule." J.A. 209.

2. The defect in appellees' historical theme, however, is more fundamental. Under the rigid rule appellees propose—which they apparently contend is constitutionally compelled (see Br. 7-8, 16, 56-65)—the "only exception" to counting people where they live and sleep most of the time on census day "is for persons, such as travelers at inns and hotels, who are 'occasionally absent' from their homes for a few days or weeks as of the census date." Br. 8 (quoting Act of Mar. 1, 1790, ch. 2, § 5, 1 Stat. 103). There is no historical or legal foundation for this crabbed view of who (to use the language of the first Census Act and the Census Clause) may be regarded as "belonging" among the "respective Numbers" of the States. § 5, 1 Stat. 103; Art. I, § 2, Cl. 3.[3]

In the first place, as we have just pointed out, the enumerators' instructions for most of the censuses since 1870 have expressly provided for inclusion of certain categories of persons who were absent for far more than "a few days or weeks" on the census date. Moreover, the first Census Act (and the succeeding five Census Acts through 1840) provided not only that persons whose "usual place of abode" is in a family shall be returned as of that family, but also that "every person occasionally absent at the time of the enumeration [shall be returned], as belonging to that place in which he usually resides in

[3] Appellees apparently confuse the *definition* of "usual residence," as articulated under current administrative policy, with the counting of a person who is *away* from his usual residence. Thus, appellees cite (Br. 8) Stipulation 8, which states that under a "1983 intra-agency memorandum" concerning the 1990 census, "the Census Bureau defined 'usual residence' operationally as where a person spends four nights a week, or more than 182 days in a calendar year." J.A. 174. Nothing in that definition, however, suggests that a person may not be counted at his usual residence if he is away (*e.g.*, on an extended business trip, at boarding school, or while serving in Congress) for more than three nights a week or 182 days in a calendar year. See Gov't Br. 4 & n.1.

the United States." § 5, 1 Stat. 103. Nothing in this text imposed an arbitrary limit (particularly "a few days or weeks") on the length of time a person could be absent from a place and yet nevertheless be counted at that place.

In addition, the first Census Act (and succeeding Acts) provided for the counting of "inhabitants" of the States (§ 1, 1 Stat. 101), and the debates on the Census Clause likewise refer to an enumeration of "inhabitants." James Madison—who had a hand in drafting the first Census Act—understood that the term "inhabitant" "would not exclude persons absent occasionally *for a considerable time on public* or private *business*." See Gov't Br. 34. Furthermore, the directive in the first Census Act to count those absent at their usual residence "in the United States" makes it clear that the contemplated absences included those outside the United States—which were apt to be for an extended period in 1790 and the decades following. Thus, the earliest Census Acts were plainly broad enough to permit inclusion in state apportionment counts of persons who were out of State (and out of the country), even "for a considerable time," in the service of the United States.

The reference to persons "occasionally absent" from the place at which they usually resided in the United States was omitted from the Census Act of 1850. Act of May 23, 1850, ch. 11, 9 Stat. 428. The enumerators' instructions for the 1850 census, however, provided not only that all persons whose "usual place of abode" was with a particular family were to be enumerated with that family, but also that "[a]nyone who is temporarily absent on a journey, or for other purposes, without taking up his residence elsewhere, and with the intention of returning again, is to be considered a member of the family." See Gov't Br. 4.

In short, the constitutional, statutory, and administrative materials from the first census through the twentieth confirm the propriety of including in the apportion-

ment counts certain categories of individuals who were out of the country for extended periods of time. Appellees, by contrast, have not cited a *single* authority suggesting that it is unlawful to do so.[4] Thus, the Secretary's decision to include federal personnel serving their country abroad in the 1990 census counts for the States was firmly rooted in precedent.

3. Nor, contrary to appellees' view (Br. 65-67), is there anything anomalous or unfair about regarding Americans who are serving their country abroad (and their dependents) as still "belonging" among the "respective Numbers" of the States for purposes of the census. On the contrary, as the administrative record confirms, such persons: pay taxes and vote in the United States; typically have strong family ties here; are often abroad involuntarily; generally have specified periods of service and will return; obviously have close ties to the United States government and are still under United

[4] Appellees cite (Br. 9) Stipulation 18, which states that "[i]n 1830 and 1840 and in every census since 1900, the Census Bureau has obtained administrative counts of at least a portion of the American population living overseas as of each census date," and that with the exception of 1970 and 1990, the Bureau has not included such persons in state populations for apportionment purposes. J.A. 177. However, that stipulation concerning the practice with respect to federal personnel or others who were counted "as a separate group" on the basis of their station abroad (Stip. ¶26 (J.A. 179)) says nothing about the prior authority for and practice of counting persons abroad in the course of the census in the United States. See note 2, *supra*.

Moreover, Stipulation 19 states that "[f]or purposes of apportionment of soldiers to states, the United States government first promulgated a specific written rule in connection with the *1880 census*." J.A. 177 (emphasis added). This stipulation refutes appellees' suggestion that there were prior legal standards on the question. The 1880 rule was that soldiers, civilian employees, and other residents at posts or military reservations "will be enumerated in the district in which they reside, equally with other elements of the population." *Ibid.* That rule did not specifically address the situation of a soldier or civilian serving abroad, who would not have been in an enumeration district.

States jursidiction; regard the United States as their home; and regard themselves as being represented in Congress. See, *e.g.*, J.A. 47, 73, 120, 124.

There is, moreover, a great deal of common sense in relying on the home of record of a service member stationed abroad—his "permanent home or actual home" at the time of enlistment (Gov't Br. 6)—to determine the State to which the service member "belongs" and may be regarded as an "inhabitant" of for these purposes. The home of record was the last place in which he chose to reside (see Gov't Br. 9, 42), and involuntary transfers by the military after that time do not necessarily manifest an affirmative intention to abandon that home and to assume a permanent residence elsewhere.

In these respects, home of record has characteristics in common with the familiar legal principle of domicile. Ordinarily, a person's domicile continues until it is superseded by a new domicile, typically by choice, which requires both physical presence at the new domicile and an intention to make it one's home for the time at least. See Restatement (Second) of Conflict of Laws §§ 11, 16, 18, 19 (1971). However, a person does not ordinarily acquire a domicile of choice by his presence in a place under compulsion—a rule that applies to a soldier or sailor ordered to a new duty station. *Id.*, § 17 & comment d; see also *id.*, § 12, illustration 4 (a naval officer may retain his "home" even though he "is away much of the time and often for more than a year at one time").[5]

Significantly, Massachusetts itself follows these very principles for federal military and civilian personnel in other contexts. For example, it has no difficulty considering its service men and women serving overseas as its

[5] We do not contend, of course, that these general common law principles of domicile are controlling with respect to the ability of military personnel to claim or change a domicile. See, *e.g.*, 50 U.S.C. App. 574.

own when it comes to taxing them,[6] and it authorizes them to vote.[7] Yet when it comes to counting these persons for purposes of determining representation in Congress, Massachusetts insists that federal military and civilian personnel stationed abroad are (and indeed constitutionally must be) inhabitants of *no* State, including Massachusetts itself. They quite literally do not "count."

B. *Unavailability of Judicial Review.* The district court had no authority to set aside the state census totals and order a reapportionment of the House of Representatives based on its own disagreement with the manner in which the Secretary chose to include federal personnel abroad among the respective populations of the States, be-

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[6] Massachusetts subjects to its income tax every "inhabitant of the commonwealth." The term "inhabitant" is defined to mean "any natural person domiciled in the commonwealth." See Mass. Ann. Laws ch. 62, §§ 1, 25 (Law. Co-op. 1978 & Supp. 1989). Income earned by Massachusetts domiciliaries serving in federal military or civilian positions abroad is therefore subject to the Commonwealth's income tax. See Mass. Dep't of Rev. Ltr. Ruling 84-15 (Jan. 19, 1984) (member of U.S. Foreign Service posted in Africa subject to Massachusetts income tax because "[a]n individual who is a Massachusetts domiciliary will remain so and will be subject to Massachusetts income taxation until he establishes a new domicile out-of-state with the intention of making the new location his home. Neither a temporary nor protracted absence from Massachusetts will effectuate a change of domicile for an individual unless all the requisites for such a change are present.").

[7] See Mass. Ann. Laws ch. 54, § 103B (Law. Co-op. 1990) (defining "[s]pecially qualified voter" to include, *inter alia*, "those persons in the active service of the armed forces of the United States, and their spouses and dependents, who are absent from the city or town of their residence * * * whose last domicile immediately prior to departure from the United States was, or whose present domicile is Massachusetts, and who are otherwise eligible to register as voters"). See also 42 U.S.C. 1973ff *et seq.* (protecting the right to vote in federal elections of members of the uniformed services and merchant marine, their spouses and dependents, and overseas voters absent from the place of residence where they are otherwise qualified to vote).

cause judicial review is not available under the Administrative Procedure Act. Gov't Br. 16-33.

1. Appellees contend (Br. 74-83) that there are "meaningful standard[s] against which to judge the agency's exercise of discretion." Br. 74 (quoting *Webster* v. *Doe*, 486 U.S. 592, 600 (1988), and *Heckler* v. *Chaney*, 470 U.S. 821, 830 (1985)). They first seek to derive such standards from the reference to "actual Enumeration" in the Census Clause of the Constitution (Art. I, § 2, Cl. 3) and the reference to persons "in each State" in Section 2 of the Fourteenth Amendment. But the textual commitment of the taking of the census to the Secretary's discretion—"in such form and content as he may determine," 13 U.S.C. 141(a)—contains no exception permitting judicial review for alleged constitutional violations. We recognize that in *Webster* v. *Doe*, 486 U.S. at 603-604, the Court distinguished between constitutional and non-constitutional claims, and indicated that a "heightened showing" was necessary to establish a bar to review of the former. *Webster*, however, involved an alleged violation of a distinctly personal right. This case implicates no such distinctly personal right extrinsic to the constitutional provisions governing the conduct of the census; it involves an alleged violation of the census provisions themselves. Appellees thus assert the interest—which is shared by all 250 million people of the United States (and the States in which they reside)—in having Congress conduct a census that complies with whatever standards the Constitution may lay down. Cf. *Valley Forge Christian College, Inc.* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 482-483 (1982); *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 216-222 (1974).

Moreover, the Census Clause provides for the census to be made "in such Manner as they [the Congress] shall by Law direct." That constitutional text "fairly exudes deference" to Congress (and, here, its delegee), *Webster*, 486 U.S. at 600, and thus weighs heavily against carving out

an exception to the "agency discretion" bar for a supposed constitutional violation. Nor do the general phrases that appellees seize upon—"actual Enumeration" in the Census Clause and "in each State" in the Fourteenth Amendment—add any force to their claim. The former is modified by the open-ended and discretionary phrase "in such Manner as they shall by Law direct," and the latter merely reflects the proposition that persons are to be counted in relation to the States, without furnishing any standards to resolve cases such as this.

In any event, if judicial review of appellees' claims based on the Constitution is not barred, those claims are readily disposed of on the merits. If Congress had enacted a statute requiring inclusion of federal personnel abroad based on home of record or comparable data, the constitutional question under the Census Clause—as under any other grant of plenary authority to Congress—would be whether there is any rational basis supporting Congress's decision. See *Preseault* v. *ICC*, 494 U.S. 1, 17-19 (1990) (Commerce Clause); *Perez* v. *Brownell*, 356 U.S. 44, 60 (1958) (Necessary and Proper Clause). For the reasons given above (see pages 4-8, *supra*) and in our opening brief (at 34-37), we think it clear that Congress could rationally decide to allocate persons serving abroad among the States on the basis of home of record.[8] It follows that there is no valid constitutional objection to the same course adopted by the Secretary, pursuant to an unbridled delegation of authority from Congress.

Contrary to appellees' contention (Br. 11-13, 58-65), nothing in the text or background of the Fourteenth Amendment suggests that the phrase "in each State" compels a different result. Indeed, both before and after adoption of the Amendment, the Census Acts and enumerators' instructions provided for counting persons in a

[8] There is no APA-type requirement in such a constitutional case that the judgment be based on a legislative record or that the justifications for the approach chosen be articulated. *United States Railroad Retirement Board* v. *Fritz*, 449 U.S. 166, 179 (1980).

State even though they had been absent for a considerable period. See pages 2-6, *supra*.[9]

Appellees find "strong evidence" for their Fourteenth Amendment argument in what they say was the decision by census authorities in 1870 to count Union soldiers who then were stationed in the South in the States where they were stationed, claiming that it was contrary to the "natural inclinations" of federal census authorities. Br. 63-64. Both the premise and conclusion of this argument are flawed. There was no specific instruction on where to count troops until 1880, and it is unclear whether, prior to that time, they were apportioned where based in the United States or at their family home. See note 4, *supra*. The latter practice was, in fact, specifically required in the 1900 instructions. Stip. ¶ 10 (J.A. 175). Moreover, the passage in the district court's opinion that appellees

[9] Appellees rely (Br. 11-12, 58-63) on Congress's rejection of proposals to limit those to be counted for apportionment purposes under the Fourteenth Amendment to "citizens" or "legal voters," in favor of the whole number of "persons" in each State. That deliberate decision to ensure an expansive reach of the "respective Numbers" of the States scarcely supports appellees' contention that the Fourteenth Amendment *narrowed* the category of persons who could be counted by excluding those who were absent from a State for a considerable (but unspecified) time.

Appellees also rely (Br. 18, 55-56) on a 1988 letter from the Acting Assistant Attorney General for Legislative Affairs stating that the Justice Department entertained "serious doubts" about whether the Fourteenth Amendment would permit inclusion of overseas federal personnel in census counts. J.A. 241. That letter expressly did not state a definitive view on the issue, observing (in a portion of the relevant paragraph omitted by appellees) that "we continue to review the case law and legislative history pertinent to resolution of this question." *Ibid.* A footnote to the same sentence states that the Commerce Department had advised that the Census Bureau never counted military and State Department personnel stationed abroad. J.A. 241 n.13. That information was, of course, wrong. Finally, both the Commerce Department and the Acting Assistant Attorney General apparently were unaware of the previous 1969 legal opinion approving inclusion of overseas personnel in the apportionment counts. Gov't Br. 6.

cite for this proposition only states (without citation to any supporting authority) that northern troops were "apparently" counted at their posts. In any event, the number of Union troops in the South in 1870 was not large, and it is not at all clear that counting them in the South in that year (or the decade to come) would have run counter to the "natural inclinations" of federal census takers. For 1870 was the height of Radical Reconstruction, and the electorate was controlled by Union military governors. See 2 S.E. Morrison & H.S. Commager, *The Growth of the American Republic* 42-43 (4th ed. 1956).[10]

Finally, there is no merit to appellees' repeated suggestion (Br. 5, 20, 39-40 & n.12, 56-57, 66) that the manner in which overseas federal personnel and their dependents were counted did not constitute an "actual Enumeration"

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[10] Appellees cite (Br. 67-69) *Carrington* v. *Rash*, 380 U.S. 89 (1965), but the case is inapplicable. *Carrington* involved an equal protection challenge to an irrebuttable presumption affecting the exercise of the fundamental right to vote. While *Carrington* held that a State could not *always* deem the service member to be a voting resident of the State where he was a legal resident at the time of enlistment, even if he otherwise satisfied the generally applicable standards of residence in the State, it did not hold that a State could *never* deem the service member to be a resident of the State of his home of record, even where, as here, he or she is overseas, rather than in another State (as in *Carrington*). Moreover, it said nothing about whether the Federal Government may make a categorical judgment that an individual should be regarded, for census purposes, as belonging to the "respective Numbers" of the State where he enlisted.

Significantly, the Court in *Carrington* noted, quoting a 1964 Defense Department survey of state voting qualifications, that "[f]or voting purposes the legal residence of members of the Armed Forces is generally the State from which they entered military service" (380 U.S. at 92 n.3)—home of record. That prevailing practice further undermines appellees' argument in this case that residents of Massachusetts and other States who enlist in the Armed Forces do not retain substantial ties to their home of record and that the Census Bureau's reliance on that method here constituted a radical departure from the way in which military personnel have been treated generally.

within the meaning of the Census Clause. The Census Bureau did not speculate about or estimate the number of such persons. They were *counted*—in a precise total, 919,810 (Stip. ¶ 53 (J.A. 185))—on the basis of information principally furnished by the Defense Department identifying which of its personnel were stationed abroad and how many dependents they had. The Defense Department and Census Bureau then relied on home of record or comparable data that had been furnished on individual forms by those personnel in order to allocate them among the States. Nothing in the Census Clause suggests that this procedure was unconstitutional because each individual involved was not personally visited by a Census Bureau enumerator. That has not been the practice for some time. Census data are commonly collected from forms, prepared by one person on behalf of a family; the Bureau then counts people from the completed form. Indeed, when that method fails, census personnel will ask for information from a neighbor or other source thought to have knowledge. Furthermore, historically, persons in a prison, military post, or other institution were treated as a "family" for census purposes, and it was usually sufficient for the enumerator to contact the head of the "family"—*i.e.*, prison warden or base commander—to obtain the necessary information about the persons under his custody or command. See, *e.g.*, J.A. 93; C.D. Wright & W.C. Hunt, *History and Growth of the United States Census: 1790-1890*, at 156-157 (1900). The method used here was indistinguishable as a constitutional matter.

2. With the constitutional issues thus removed from the case, appellees' objections to the state census counts are reduced to garden-variety APA claims, principally based on the contention that the Census Bureau did not adequately explain the particular subsidiary matter in the conduct of the census that appellees challenge—the manner of including federal personnel abroad. As we have explained (Gov't Br. 19-21, 23-27, 31-33), Congress committed the "form and content" of the census to the

Secretary's discretion, and there is no "law to apply" in deciding this case.

Citing cases that have relied on agency regulations as a basis for law to apply—a question left open in *Chaney*, 470 U.S. at 836—appellees contend (Br. 76-80) that the "usual residence" policy furnishes such "law" here. In a case such as this, however, that approach would circumvent the standard Congress prescribed in the APA itself: whether the agency action has been "committed to agency discretion *by law*." 5 U.S.C. 701(a)(2) (emphasis added). Here, there can be little doubt that the applicable "law" (13 U.S.C. 141(a)) commits the conduct of the census to the Secretary's discretion. An *agency*'s decision to adopt regulations, not required by the governing statute, to guide the exercise of its discretion, should not lightly be taken to confer a right of judicial review that *Congress* has withheld by the breadth and nature of its delegation. But even if we assume that actual regulations might in some circumstances suffice (on the premise that the agency intended and had the authority to bind itself to a judicially enforceable channeling of its discretion), the concept of "usual residence" furnishes no such basis here. That concept is embodied nowhere except in the conduct of *prior* censuses by the Census Bureau. It is, significantly, not in the Census Act or any regulation. Procedures followed in a prior census do not bind the agency one or many decades later, because each census is a separate undertaking. Furthermore, as we have explained, the principle of "usual residence" has been modified and departed from by the Secretary, in his discretion, over the years; the "usual residence" principle furnishes no guidance for a court to determine whether a modification or departure is appropriate.

Remarkably, appellees also contend (Br. 80-81) that "pragmatic concerns" weigh in favor of judicial review here. Pragmatic concerns, in fact, point decisively to the opposite conclusion. If review is available, the myriad administrative decisions that must be made in the course

of the census will invite numerous, parochial, and often competing lawsuits by individuals, local governments, and States. Chaos and uncertainty would be inevitable for all concerned—the Census Bureau, Congress, the States, local governments, candidates, and interested citizens. See Gov't Br. 24-27.

3. Appellees try (Br. 83-88, 111-114) to minimize the import of Congress's decision to vest directly in the President the responsibility for submitting the statement of reapportionment to Congress, characterizing that responsibility as purely "ministerial." We disagree with appellees' characterization even as regards the statement the President transmitted to Congress on January 3, 1991. While it is true that the method of equal proportions calls for application of a set mathematical formula to the state population totals produced by the census, the President's constitutional duty to "take Care that the Laws be faithfully executed" (Art. II, § 3) would entitle (if not obligate) him to direct a reexamination of the census totals if he believed they were flawed in some substantial respect.[11] But however that may be, the President's decision whether to transmit a *second* statement to Congress to supersede the one required by 2 U.S.C. 2a—if authorized at all—is plainly not a ministerial duty.[12]

Appellees assert (Br. 88-89) that the 2½ years between the census and first congressional election following reapportionment furnishes "ample time" to conduct what it terms the "minimal review" contemplated by the APA. That assertion is difficult to square with appellees' vig-

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[11] Appellees cite (Br. 87 n.28) Senator Vandenberg's characterization of the President's function as ministerial. Senator Black, however, took a contrary view. See 71 Cong. Rec. 1845-1846 (1929).

[12] Appellees do not challenge our position that the President is not subject to suit under the APA, contending that it is "irrelevant" because "no action or omission by the President or his staff has been called into question or otherwise put at issue in this litigation." Br. 113 n.36. If true, the President should not have been named by appellees as a defendant, and should be dismissed from the suit.

orous (but unsuccessful) opposition to our application for a stay of the district court's judgment, in which Massachusetts insisted that it needed immediate assurances from this Court in order to carry out its elections. And while appellees point to the brief time between the filing of dispositive motions in district court below and oral argument in this Court, that has been accomplished only by means of an extraordinarily expedited briefing and argument schedule. Moreover, this case is not the end of the line. A large number of other census cases are waiting in the wings. As a result, unless the Court holds that judicial review is barred, a disposition of this case on the merits will not, even now, bring finality to the 1990 census and the apportionment of Representatives among the States for the next decade. Congress did not intend the census—which historically has been free from litigation (Gov't Br. 23)—to be subject to such piecemeal and unwieldy intrusion by the courts.

In their final effort to overcome the barriers to judicial review, appellees quote, wildly out of context, a floor statement by Senator Vandenberg in 1929 that Congress should not "leave the problem wholly to the voluntary instincts and attitudes of Congress itself." Br. 93-94 (quoting 71 Cong. Rec. 1611-1612 (1929)). Senator Vandenberg was explaining why the automatic apportionment mechanism was necessary, since Congress had failed to enact an apportionment law following the 1920 census. He in no way suggested that the courts could intervene and upset the finality of the census and resulting apportionment.

C. *The Reasonableness of the Secretary's Decisions.* Appellees' objections (Br. 38-52) on the merits to the Secretary's inclusion of overseas personnel in the census counts are both factually misleading and insubstantial.

1. Appellees state (Br. 52) that the home of record data had been "proven unreliable" by the 1970 census. In fact, what the Census Bureau witness said in the 1976 congressional testimony on which appellees base this entire

point was that the Census Bureau did not plan to include overseas federal personnel in the census counts for 1980 for a variety of logistical and other reasons, one of which was that "[t]he data on 'home State' of those overseas are of an *unknown reliability*" (emphasis added), because the Census Bureau believed at the time that a service member could select a home of record to obtain the advantage of a low or no income tax in the State involved. See Gov't Br. 7 (quoting J.A. 61-62). The witness cited for that proposition a 1976 study of a commission on taxation of military income. J.A. 61 n.3. That study in fact discusses the ability of a service member to select his or her *legal residence* in order to obtain tax advantages; the study did not address home of record, which represents the service member's permanent or actual home at the time of enlistment, and thus cannot readily be selected for tax purposes. See Gov't Br. 45-46 & n.28. The 1990 Congressional Research Service study of the three available methods for allocating overseas personnel confirmed that it is legal residence data that may be skewed because of tax considerations. See Gov't Br. 43 n.26. Thus, whatever uncertainty had been generated in 1976 about the reliability of home of record data because of the Census Bureau's misunderstanding was dispelled before the Secretary made his decision in July 1990 to use home of record data.

2. Appellees repeatedly assert (Br. 24, 44, 52, 56, 67) that the Census Bureau previously had concluded that it would be "arbitrary" to allocate overseas federal personnel among the States according to home of record data, and then fault the Secretary for not explaining adequately his decision to use the data in the face of that prior assessment. Appellees mischaracterize the record. What appellees refer to is a statement in the enumeration and residence rules prepared by the Census Bureau in 1987 for the 1990 census, which, while observing that it had the discretion to include federal personnel abroad in the apportionment counts, J.A. 210-211, stated that the Bureau did not plan to do so in 1990 because "the assign-

ment to geography would be arbitrary and operationally difficult." J.A. 212. Fairly read, this statement means nothing more than that any method of allocating overseas personnel to particular States would have a certain "arbitrary" quality, presumably both because the personnel were abroad and therefore would not be physically present in the States in which they were counted, and because any rule of general applicability for determining the States to which overseas personnel "belong" would not perfectly capture the circumstances of every individual involved. In other words, the observation reflected a policy perspective expressed three years in advance of the 1990 census and subsequently revised by the Census Bureau and the Secretary, the official in whom Congress has vested responsibility for conducting the census.[13] Indeed, the fact that the document expressly cited the legal authority for apportioning the overseas personnel, and recognized that the decision was "discretionary," refute any suggestion that the document used "arbitrary" in an APA sense.

3. Appellees' contention (Br. 52-55) that the Secretary mindlessly adhered to the decision to allocate federal personnel abroad after cancellation of the Defense Department survey is plainly refuted by the record. The record shows that when the Secretary decided to include overseas personnel in the apportionment counts, he specified that this decision was contingent upon "timely receipt of acceptable data from the Defense Department," J.A. 122, not—as appellees would have it—upon completion of the planned Defense Department survey. The record then demonstrates

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[13] Appellees state (Br. 1) that the Secretary decided to "override" the rules adopted by the Censsu Bureau for the 1990 census. In fact, it was the Census Bureau that "propos[ed]" including federal personnel overseas in the apportionment counts (J.A. 120), and recommended use of home of record data after cancellation of the Defense Department survey. J.A. 164. In any event, responsibility for the census rests by law with the Secretary. See *INS* v. *Doherty*, 112 S. Ct. 719, 726-727 (1992).

that, after cancellation of the survey, the agency reviewed the available data and satisfied itself that the method it proposed to use "will satisfy our criterion that the best quality data be used for the 1990 census," J.A. 158, and would be "of sufficient quality for apportionment purposes." J.A. 162. Appellees may disagree with that conclusion, but that is not the issue. Rather (assuming the availability of judicial review), the issue is whether the agency considered the relevant factors after cancellation of the Defense Department survey, and the record establishes that it did.

D. *Remedy.* Applleees acknowledge that "[i]n most instances" a remand is the appropriate remedy for an APA violation, and that exceptions to this rule are available only "in rare circumstances." Br. 95. In arguing that this is such a "rare circumstance," appellees lose sight of the basis of their APA claim. Appellees claim that there is no time "to create a better method" for including overseas personnel in the census. Br. 98. But what appellees alleged and what the district court found violated the APA—incorrectly, in our view (see pages 16-19, *supra*)—is that "[t]here is no evidence that the Census Bureau considered reverting to its prior policy." J.S. App. 76a. If that is in fact the case, a remand is required to afford the Secretary the opportunity to engage in the allegedly omitted consideration. This is particularly true in light of the lower court's ruling that, if "properly supported," "[t]he policy decision to apportion overseas federal employees is well within the discretion afforded the Census Bureau under the Census Act" and is not "inherently unconstitutional." *Id.* at 79a, 81a n.31. By refusing to remand to the Secretary, the district court arrogated that "policy decision" to itself.

Whatever the propriety of the court's order requiring the Secretary to revise the tabulation of populations for every State, it had no authority to order the President to bring about a reapportionment of the House of Repre-

sentatives.[14] Equitable principles required denial of injunctive relief having so intrusive an effect on the coordinate Branches of the Federal Government and on the States. Gov't Br. 48-49.[15]

For the foregoing reasons and those in our opening brief, the judgment of the district court should be reversed and the case remanded with instructions to enter judgment for the appellants.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

APRIL 1992

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[14] Appellees try to avoid the implications of such relief by asserting that "the Secretary need not recompute census totals at all," since the parties stipulated that only Massachusetts and Washington would be affected, and that the court only ordered the Clerk to send new certificates to two States. Br. 109-110. However, the judgment below requires the Executive Branch defendants to submit to the Clerk a statement showing the number of Representatives to which each State would be entitled under 2 U.S.C. 2a "without inclusion of the overseas census counts in the apportionment count," and directs the Clerk to send to "each state" a "recertification" of the number of Representatives to which it is entitled, in accordance with the court's order. J.S. App. 95a. The former clearly calls for a revision of the "apportionment count" by deleting overseas personnel from each State's population, and the latter clearly constitutes a reapportionment of the House.

[15] If the Court finds a violation of the APA by the Secretary, but agrees with us that a remand of the tabulation of state populations totals to the Secretary is the appropriate remedy, there is no occasion to consider whether the district court could ever order the President to transmit a new apportionment statement to Congress. Instead, the President's statement required by 2 U.S.C. 2a, on which the States' current "entitlements" are based, should remain in effect pending completion of the proceedings on remand and submission by the Secretary of any new or revised report to the President. The President would not be called upon to consider transmitting a new statement to Congress unless and until the Secretary submitted a revised tabulation that would result in a different apportionment.

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FOR ARGUMENT

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NO. 91-1502

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

BARBARA FRANKLIN, SECRETARY OF COMMERCE, et al.,

Appellants,

v.

THE COMMONWEALTH OF MASSACHUSETTS, et al.,

Appellees.

On Appeal From the United States District Court
for the District of Massachusetts

REPLY BRIEF OF THE APPELLEES COMMONWEALTH OF MASSACHUSETTS, et al.

SCOTT HARSHBARGER
ATTORNEY GENERAL
OF MASSACHUSETTS

Dwight Golann*
Steve Berenson
Assistant Attorneys General
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2200

*Counsel of Record

John P. Driscoll, Jr.
Edward P. Leibensperger
Neil P. Motenko
Special Assistant Attorneys
General
Nutter, McClennen & Fish
One International Place
Boston, Massachusetts 02110
(617) 439-2000

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I. INTRODUCTION.

The Secretary approaches this case as if it merely involved an administrative choice among three forms of imperfect technical data. Because, it is argued, the prior Secretary made a rational choice among the limited set of options he considered, the decision met the minimum standards of the Administrative Procedure Act. Appellants' Br. at 16. This argument carefully avoids the Secretary's complete failure to consider important alternatives to apportioning based on home of record. See infra at 14. It also fundamentally misconstrues the nature of this case.

A. The apportionment census is mandated by the United States Constitution. It is carried out under express provisions of the Apportionment Clause and the Fourteenth Amendment. Those provisions are mirrored in the language of 2 U.S.C. § 2a, which governs the actions of the Secretary at issue in this case. The Secretary has argued that she has an "unbridled breadth of delegation of authority," which may not be reviewed by any court, to conduct the apportionment count as she sees fit. Appellants' Br. at 21. This contention ignores, however, the Secretary's duty to implement the constitutional process, as well as the statutes that mandate how the decennial census must be conducted. As argued below, the Secretary's 1990 decision concerning apportionment counts is judicially reviewable and, on the facts of this case, illegal.

B. The Secretary also misstates the implications of this case for other census litigation, attempting to create a "Pandora's Box" of undesirable results. See Appellants' Br. at 25-26. But, while the apportionment census, which is all that is at issue here, is constitutionally mandated, the many other surveys and censuses conducted by the Department of Commerce, such as those which control the distribution of federal monies to states and localities, are creatures of statute. See 13 U.S.C. §§ 141(d) et seq. There is no required relationship between the conduct of the apportionment census and these discretionary census programs.

For example, Congress has mandated that the mid-decade census be conducted "without regard" to the statutory provisions governing the apportionment census, and has further stated that its results may not be used for reapportionment. See 13 U.S.C § 141(d). Similarly, in the only two instances in which the Secretary apportioned overseas employees back to states, 1970 and 1990, he did not include the overseas counts in the population totals for local government units, which are used to disburse local federal aid. A claim in 1970 that the Secretary was required to conduct discretionary censuses by the same rules as the constitutional one was properly rejected. See Borough of Bethel Park v. Stans, 449 F.2d 575, 581 (3rd Cir. 1971).

The Secretary also drew a distinction between apportionment counts and other census activities in 1990. Thus, when the

Commerce Department published the state-by-state 1990 Census results, it specifically distinguished between the "resident population" of each state (excluding overseas federal employees) and its "total" population (including those employees). See U.S. Dept. of Commerce Publication CB91-07 (January 7, 1991), Table 5.1/

A decision in favor of Massachusetts is also unlikely to provoke any wave of litigation over the apportionment of Congress. The reason is simple: no state has standing to sue unless it can prove that an illegal census policy caused the loss of its seat. In the 1990 reapportionment, Washington state was awarded the 435th and final seat. Massachusetts would have received the 436th seat apportioned, had one been available. The margin by which Massachusetts lost its eleventh seat was extremely narrow. See Congressional Research Service, House Apportionment Following The 1990 Census: Using the Official Counts 5 (Table 2) (February 4, 1991) (hereinafter "House Apportionment"). It is precisely because Massachusetts lost this final seat by such a razor-thin margin that it has standing to contest the Secretary's decision. Given the narrow

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1/ In other departmental publications concerning the 1990 results, the total population listed for each state is also higher than the sum total of the populations of each governmental unit in the state, because the Secretary chose not to include overseas employees in local census counts. See "Summary Population and Housing Characteristics," U.S. Dept. of Commerce Publ. 1990 CPH-1-49. This practice is entirely legal.

margin, the difference between the overseas employees apportioned to Massachusetts and Washington[2/] was crucial. Other states, however, would have to increase their relative populations by much larger margins in order to qualify for the last seat apportioned. This explains why only Massachusetts and Washington, out of all the states, were affected in terms of their congressional representation by the Secretary's 1990 decision concerning overseas employees. It is also why, as a practical matter, only the few states closest to qualifying for the last seat awarded in any apportionment are likely to have standing to sue. And, given the deference shown by federal courts in census cases, even those few states are unlikely to identify any viable legal claim. For these reasons, no "Pandora's Box" will be opened if the lower court's decision is affirmed.

C. The Secretary has again argued that the lower court's order "throws out" 922,810 persons from the census. Appellants' Br. at I. And amicus Washington claims that the decision below in some way interferes with overseas employees' voting rights. Washington Amicus Br. at 22. These claims, too, are either overstated or simply untrue.

2/ Washington has stated correctly that 21,249 overseas employees were apportioned to Washington in 1990. Washington Amicus Br. at 3. Only 12,626 overseas employees were apportioned to Massachusetts. Compare House Apportionment at 5 (Table 2 - state population counts including overseas employees) with id. at 8 (Table 3 - state population counts excluding overseas employees).

The lower court's Final Decrees and Orders did not, in fact, "throw" anyone out of any count, but simply required the Secretary to restate how many seats in Congress the states were entitled to if overseas employees were not apportioned. J.S. App. 83a (Slip Op.); 95a (Final Decrees). As the parties stipulated, this means that Massachusetts and Washington would retain the same number of seats in Congress as they had during the 1980s.

Overseas Americans would in fact be counted in the 1990 Census under the lower court's orders -- as Americans. It is true that they would not be apportioned to particular states where, the parties agree, they were not residing in 1990. In this respect, however, the census' treatment of overseas employees is no different from the way that all residents of the District of Columbia, Guam, and other U.S. territories are counted. In 1990 and prior censuses, the Secretary counted these persons as Americans, but did not apportion them to "home" states where they were not living. J.A. 206. Also, the Secretary has never apportioned members of domestic military to their "home states," instead, they have always been counted at the places they were posted and living on the census date. Stip. 10 (J.A. 175).

Similarly, the lower court's orders do not interfere with the voting rights of overseas residents. The Constitution makes no connection between the apportionment census and

numbers of voters. See Appellees' Brief at 62-63. The absentee voting statute permits Americans abroad to vote on a basis quite different from the "home of record" that a serviceman may have declared years earlier. See, e.g., 42 U.S.C. § 1973ff-6(5) (requiring some absentee voters to register at "the last place the person was domiciled in before leaving the United States"). The Secretary's 1990 decision to apportion overseas employees thus had a bizarre effect on voting rights: some overseas employees were undoubtedly apportioned to increase the representation of states different from the ones in which they had elected to vote.

II. THE SECRETARY'S ACTION WAS ILLEGAL.

The Secretary misunderstands Massachusetts' argument as to why the 1990 decision to apportion employees to states based on "home of record" file data was illegal. The home of record data used by the Secretary was not an "enumeration," was not accurate, and did not reflect current place of inhabitance. Those defects, which were identified by the Census Bureau but were never meaningfully addressed by the Secretary, go to the heart of the concept of a "census." As a result, they violate both the Constitution and the statutes which govern the Secretary's actions in this case.

The Constitution places three express constraints on the census process: First, the census must be done through an

"actual Enumeration." Second, the population must be recounted "within every . . . Term of ten years . . . ." U.S. Const. art. I, § 2, cl. 3. Third, reapportionment must be based on the "whole number of persons," that is "inhabitants," who are "in each State." U.S. Const. amend. XIV, § 2.

The statutes governing the apportionment census mirror the language of the Constitution. They require the Secretary to prepare a "statement showing the whole number of persons in each State . . . as ascertained under the . . . decennial census . . . ," see 2 U.S.C. § 2a, and to conduct a census every ten years. 13 U.S.C. § 141(a). Any constitutional violation would thus also constitute illegal conduct under these statutes.

"The decennial census is a headcount rather than an estimation based on sampling." Tucker v. United States Department of Commerce, No. 91-2051 (7th Cir. March 16, 1992) at Lexis p. 3, citing Carey v. Klutznick, 508 F. Supp. 420, 422-24 (S.D.N.Y.), aff'd, 637 F.2d 834 (2d Cir. 1980). Since 1790, the apportionment census has been conducted through an actual enumeration of the population, rather than a sampling. Census takers have either visited or, more recently, have mailed questionaires to each household in America. If inhabitants do not respond, "census takers must visit them personally." Id.

The Secretary's initial decision to apportion overseas employees was based on the Defense Department's ("DOD") promise to do an enumeration. That promise, however, was revoked. J.S. App. 76a. The Census Bureau did enumerate the entire domestic population of the United States, consisting of more than 248,000,000 inhabitants, but there was no enumeration of overseas military employees in 1990. Instead, as the Secretary describes at length in her brief, the 1990 Census relied solely on outdated statistical file data to apportion the vast majority of overseas employees.[3/] This failure to enumerate violated an express requirement of the Apportionment Clause and, as argued infra at 15, constituted an unexplained and unjustified departure from the Secretary's historic practice.

Second, the Constitution requires that the census be conducted on a decennial basis; that is, there must be a recount of the population "within every subsequent Term of ten Years." U.S. Const. art. I, § 2, cl. 3. See also 13 U.S.C. § 141(a). The Framers' intent in inserting this requirement is clear: they meant to guarantee that reapportionment decisions

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3/ The Census did attempt an enumeration of approximately 60,000 DOD civilian employees for whom there was no home of record data. There was only a 20 per cent response rate to this survey, however, and the census did not follow up on nonrespondents, as it did for the domestic population. Stips. 54, 57 (J.A. 185-87); J.S. App. 87a. As a result, of 901,880 overseas military employees apportioned in 1990, all except roughly 12,000 (20% of the civilian employees) were apportioned without a constitutional enumeration.

would be based on current population figures reflecting the nation's rapid demographic changes, rather than on outdated records that showed only the location of population years in the past. The Federalist No. 58. Without a current census showing the present distribution of the nation's inhabitants, neutral formulas could be applied, but Congress would nevertheless be malapportioned. See Wesberry v. Sanders, 376 U.S. 1, 14 (1964) (noting the Framers' concerns about replication of the English phenomenon of "rotten boroughs").

In 1990, the Secretary decided not to conduct a census of where the overseas population currently resided, but rather to rely on "home of record" data, which employees had designated when they first entered military service. Under DOD rules, military employees are prohibited from changing their home of record, even if their home state changes, until they are discharged or break service. J.A. 147 n.5. As the Defense Department stated to Congress in late 1989, home of record "may also be a place where the person has not lived for many years . . . ." J.A. 124 (emphasis added). The district court made the same factual finding. J.S. App. 76a-77a. Thus, in 1990 the vast majority of overseas employees were apportioned to states on the basis of the states they had listed on the dates they first entered military service, years or even decades in the past.

In her brief, the Secretary attempts to make a positive point of this failing, arguing that home of record "has the considerable virtue of 'remaining constant' in the face of the service member's often rapid mobility." Appellants' Br. at 42. This argument is, however, impermissible in the face of the clear and purposeful directive of the Constitution. By requiring that the census be repeated every ten years, the Framers intended to insure that reapportionment decisions take account of the "rapid mobility" of the American population, not deny its existence. For the Census Bureau to apportion nearly 900,000 military overseas employees in 1990 based on home of record data that was often "many years" old (or was never accurate in the first place) directly violates the constitutional command to enumerate on a decennial basis.

Finally, the Fourteenth Amendment requires that apportionment decisions be based solely on the "whole number of persons" or "inhabitants" found "in each State." The legislative history of the Fourteenth Amendment, and the use of the word "inhabitants" interchangeably with "persons," demonstrates that the drafters of the Fourteenth Amendment intended to reinforce the intent of the original Apportionment Clause, see Wesberry, 376 U.S. at 13, which was that representation would be based solely on the number of persons who were inhabiting each state on the census date. Appellees' Br. at 34.

The Secretary attempts to avoid this requirement by claiming that Massachusetts argues that only those persons who are physically present in a state on the census date can be apportioned to it. Appellants' Br. at 36. This is not Massachusetts' argument. See Appellees' Br. at 56-59. As noted in our primary brief, the "usual residence rule" has always allowed inhabitants who are "occasionally absent" from their homes to be included in apportionment counts. Id. at 8. The Secretary now argues that this sensible qualification, designed to allow persons who are on a journey on the census date to be counted at the place they actually inhabit, means that the constitutional criterion places absolutely "no limitation on the duration of the [person's] absence . . . ." Appellants' Br. at 35.

The problem with the Secretary's argument is that it confuses the issue of the duration of journeys, which in the era of horse and sail were lengthy, with the issue of whether the traveler simply occupied temporary lodgings while doing business and maintained his permanent home in a state, or established a new home or dwelling at his destination. In the former case, he was merely a traveler on a long journey, while in the latter, he became an "inhabitant" of the out-of-state location.4/

4/ Thus, Dr. Johnson's Dictionary defined "inhabitant" as "Dweller; one that lives or resides in a place." S. Johnson, A Dictionary of the English Language (W. Strahan ed.: London,

(footnote continued)

Overseas federal employees, who are stationed abroad for years and do not maintain a home in any state, are not "occasional travelers," but rather establish "dwellings" and "live" at their overseas posts. Indeed, the parties have stipulated in this case that the "usual residence of overseas employees is their overseas post." Stip. 8. (J.A. 174).

Of course, none of the Secretary's arguments about the meaning of "occasionally absent" answers the basic problem with apportioning based on home of record data: the fact that the file information did not even necessarily describe what state overseas employees had inhabited prior to 1990. As the DOD noted, home of record data may show a place where the employee "has never lived." J.A. 124. Using on these misleading and irrational criteria does not meet the constitutional requirement that apportionment be based "solely on the number of inhabitants of each state." See Wesberry, 376 U.S. at 13.

The Secretary has cited in defense of this practice a letter written in 1969 by then-Assistant Attorney General William Rehnquist. While the letter did conclude that the

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(footnote continued)

1755). The Official Instructions used in the 1990 census replicate Dr. Johnson's definition almost perfectly, stating that "[t]he 1990 census must count every person at . . . the place where the person lives and sleeps most of the time." J.A. 233.

Secretary had discretion to apportion overseas employees, it should be noted that it did not purport to analyze the constitutional provisions that regulate the census. Instead, the Assistant Attorney General relied on an earlier formal opinion of the Attorney General. See J.A. 47, citing 41 Op. Att'y Gen. 31 (1949). The 1949 Opinion simply assumes without analysis that Americans who are living overseas remain inhabitants of the United States, id. at 32, and confirms the Secretary's discretion to follow the consistent practice of not apportioning them back to states. Id. at 34.

When the Justice Department did review the legislative history of the Fourteenth Amendment in 1988, it concluded that "throughout the debates on section 2 of the Fourteenth Amendment, there seems to be a premise that the census would count inhabitants of the United States and not individuals who did not reside in one of the states. Accordingly, we entertain serious doubts as to the constitutionality" of apportioning overseas federal employees to states. J.A. 241.

The Secretary's 1990 decision to apportion overseas employees to states based on file data that was often inaccurate or many years out of date, and to assign them to states of which they were admittedly not current inhabitants, thus violated the express terms of the Constitution and governing census statutes.

III. THE SECRETARY'S UNEXPLAINED FAILURE TO CONSIDER ALTERNATIVES TO THE USE OF OBSOLETE AND INACCURATE FILE DATA WAS ARBITRARY AND CAPRICIOUS.

The Secretary characterizes the choices faced by Secretary Mosbacher in the wake of the DOD's cancellation of its planned enumeration as a limited technical choice between three available types of file data. Appellants' Br. at 41. But this Court should find the prior Secretary's actions improper for the additional and independent reason that he completely failed to consider any alternatives to the use of obsolete and inaccurate file data. In particular, the Secretary refused to consider an important alternative available to him: returning to the historic census practice of counting overseas employees as part of the overall American population, but not apportioning them to states. Secretary Mosbacher's complete failure to consider that important option, J.S. App. 79a, rendered his decision arbitrary and capricious under the standard set forth in both the majority and concurring opinions in Motor Vehicle Manufacturers Association, Inc. v. State Farm Insurance Co., 463 U.S. 29, 43 and 58 (Rehnquist, J., concurring) (1983).

The Secretary attempts in her brief to minimize the significance of the DOD's promise to conduct an actual enumeration of overseas employees. She suggests that it was the timing of the information that the enumeration was expected

to produce, rather than its quality and substance, that was significant to Secretary Mosbacher's decision to apportion. Appellants' Br. at 44-45. But enumeration is a constitutional requirement for the apportionment census, not simply a desirable option. Moreover, a review of the administrative record as a whole shows the Secretary's characterization to be inaccurate.[5/]

Given, moreover, that for two decades the defendants opposed apportionment of overseas employees largely because they had concluded (on the basis of their 1970 experience) that DOD's file data was not reliable, see J.A. 55, 61, 79, 106, 112; A.R. 37, 43, 83, 224, 271, the Secretary's decision to reverse policy and rely on file data can only be deemed reasonable to the extent it addressed the agency's prior concerns about that data. Motor Vehicles Manufacturers Association, Inc., 463 U.S. at 43. As noted, the only aspect of the Secretary's decision memoranda that in any way dealt with the Census Bureau's conclusion that home of record file data was inadequate, was the DOD's promise to conduct an enumeration. J.S. App. 66a.

5/ The lower court made a factual finding that DOD's promise to do an enumeration was key to the Secretary's decision to apportion. J.S. App. 76a. This Court need not reassess the district court's factual findings. Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 490-91 (1951). But if it chooses to do so, a review of the record will show that the Secretary's statement about timing refers to his expectation that the DOD's actual enumeration, a much more complex undertaking than a mere review of file data, would be completed in time to be incorporated into the 1990 apportionment counts.

The Secretary attempts to demonstrate a reasoned basis for the decision to apportion based on home of record by citing conclusory statements that appear in the Administrative Record from July 1990. The lower court found that these brief conclusions were contradicted by the facts contained in the record as a whole, and were therefore nothing more than justifications for a decision that was based on a prior "commitment" to certain members of Congress, rather than a reasoned analysis. See J.S. App. 78a-79a.[6/] More importantly, the documents which the Secretary cites in defense of the decision to apportion do not show any consideration of the option of returning to the historic, constitutionally grounded practice of not apportioning overseas employees.

The Secretary also argues that home of record data may have been more favorable to Massachusetts than the other two forms of file data which the Secretary considered. Appellants' Br. at 41 n.29. Even if true, this is irrelevant, since

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6/ Thus, for example, in a two-sentence memorandum dated July 13, 1990, three and one-half months after the census date, the Associate Director for the Census stated, without providing any reasoning or underlying support, that "the technical staff of the Census Bureau believes that the Home of Record comes closest to the concept of the Usual Residence among the three data sources that DOD has available." J.A. 164. However, as recently as May 17, 1990, a similar policy memorandum had stated that "'[h]ome of record' does not necessarily satisfy a reasonable concept of 'usual residence.'" J.A. 131. And a 1990 Congressional Research Service study cited by the Secretary concluded that of the three data elements contained in DOD files, last duty station, and not home of record, most closely resembles the concept of usual residence. J.A. 152.

Massachusetts has argued that file data should not have been used for apportionment at all. Moreover, the discrepancy between the distribution of this data between Washington and Massachusetts and the distribution of the actual resident populations of the two states was more than enough to cause Massachusetts to lose its eleventh congressional seat. Also, the fact that other file data was even worse does not excuse the Secretary's failure to consider the option of not using file data at all.

IV. THE SECRETARY'S DECISION TO APPORTION OVERSEAS EMPLOYEES IS SUBJECT TO LIMITED JUDICIAL REVIEW AS AN EXERCISE OF HER DISCRETION UNDER THE APPORTIONMENT STATUTE.

There is no question that Massachusetts' constitutional claims are judicially reviewable. Webster v. Doe, 486 U.S. 592, 603 (1988). But the Secretary argues that her predecessor's violations of the the apportionment and census statutes, and the failure to consider alternatives, are not.

A. The Secretary's Decision Is Not Committed To Agency Discretion By Law.

In arguing that Secretary Mosbacher's decision to apportion overseas employees is committed to agency discretion by law, the Secretary asks the Court to look solely at 13 U.S.C. § 141(a)'s provision that the Secretary conduct the census "in such form and content as he may determine." Appellants' Br. at

19. As the lower court noted, however, the actions at issue in this case were also taken pursuant to 2 U.S.C. § 2a, which provides clear "law to apply" in this case. J.S. App. 70a. That section, mirroring the language of the Constitution, requires the Secretary to prepare a "statement showing the whole number of persons in each State . . . as ascertained under the . . . decennial census . . . ." Title 13 U.S.C. § 141(a) also requires that a census be conducted every ten years. Thus, the Secretary's discretion to conduct the census is restricted at the least by the requirements that she conduct an actual census that shows the number of persons in each state, and do so anew every ten years. This provides a meaningful standard against which to evaluate the actions of the Secretary in this case.

The defendants have also acknowledged that the usual residence rule has been the "guiding principle" for apportionment decision for two hundred years. Appellants' Br. at 3. Although the Secretary argues that there has been some variation in how that standard has been applied, id. at 20, even if true, this would not disqualify the rule from providing an adequate standard for judicial review. First, except in 1970, the rule had been applied without variation to overseas military personnel beginning in 1830, to require that they not

be apportioned back to states.[7] Second, in all of the instances in which the Secretary argues that the usual residence rule has been "modified" over time, the groups of persons involved had two separate places where they lived during any single year. Such situations present the question (not present in this case) as to which of two simultaneous residences is the more "usual" one. For example, college and boarding school students maintain residences during any year both at school and their parents' homes. Members of Congress maintain residences both near Washington, D.C. and in their home districts. And seafarers maintain berths or beds both on land and on their ships.

The application of the usual residence rule to subgroups of the population with more than one residence presents inevitable "line-drawing" issues. Also, a consistently-applied rule will produce different results as factual situations (such as the length of sea voyages) change over the decades. That does not affect the consistency of the rule, or the clarity of its application to overseas employees. In this case, the parties have stipulated that overseas federal employees have only one

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7/ The 1900 census does not present an exception, as appellants claim. The relevant instruction that year required overseas military personnel to be counted at their overseas posts, and not be apportioned back to states. J.S. App. 63a n.26. A domestic rule of enumeration may have allowed some such persons anomalously to be counted for a second time at the residences of their families. Id. Since such double counting is impermissible, this anomaly should not be treated as a knowing departure from practice.

usual residence, which is their home overseas. Stip. 8 (J.A. 174).

The Secretary also suggests that because decisions about the conduct of the census involve determinations as to cost and feasibility, all such decisions must be unreviewable. This argument leads, however, to absurd results. Suppose, for example, that the Secretary had decided in 1990 that it would be too expensive to conduct an actual enumeration at all, and had ordered the Census Bureau simply to use the results of the 1980 census with a statistical adjustment. The result would not be a "decennial census," see 13 U.S.C. § 141, 2 U.S.C. § 2a(a), as anyone has ever understood the term, but according to the Secretary, the decision would be unreviewable by the courts.

Indeed, the Secretary's argument would open the way to the kind of political manipulation of census results that occurred routinely prior to 1790. If, for example, a future Secretary makes a decision in July of the census year about what data to use in that census, as occurred in 1990, he or she will already have the results of the April count and precise computerized information as to the impact of various options on the makeup of Congress and the Electoral College. If that Secretary succumbs to the political temptation to change the rules so as to move seats, and if there were no judicial revew, then it would require a veto-proof majority in both houses of Congress

to avoid serious political abuse. As the Court in Philadelphia v. Klutznick, 503 F. Supp. 663, 675 (E.D. Pa. 1980) noted:

> The census is more than a statistic. It is an essential element in the democratic process. To hold that the agency charged with its tabulation is not subject to judicial review is to hold that the Bureau is free to adopt any numbers, regardless of bias, manipulation, fraud or similarly grave abuse, which is exactly the type of conduct and temptation the Framers wished to avoid by entrusting the census to the federal government. This cannot be.

It is precisely the constitutional basis of the apportionment census and its centrality to the democratic process that makes reviewability by the non-political branch of the government essential.[8/]

The Secretary has suggested that allowing review of the apportionment census would open the floodgates to numerous challeges to minute census details and invite "micromanagement" of the census by the courts. Appellants' Br. at 25-26. This argument ignores the differences between this case, and, for example, a challenge by a local government to its population count. See supra at 2. Moreover, the fact that in all of the cases cited by the Appellants at page 23 of their brief, the courts, after determining the Secretary's actions to be reviewable, upheld the Secretary's exercise of discretion,

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8/ It could be argued that the Secretary's decisions concerning the many non-constitutional censuses and surveys conducted by the Department, see 13 U.S.C. §§ 141(d) et seq., should be unreviewable. That question, however, is not before the Court in this case.

demonstrates that the federal courts fully understand the deference that must be given to the Census Bureau's technical judgments. The availability of judicial review has not, and will not, render the conduct of the census impracticable.

B. The Relevant Statutes Do Not Implicitly Preclude Judicial Review.

The Secretary argues that her report of state population totals, and the President's statement to Congress of the number of representatives to which each state is entitled, are merely arithmetic statements, and thus are not amenable to judicial review. Appellants' Br. at 17, 28. The plaintiffs do not contest that the Secretary carried out the mathematical computations assigned to her. It is the decision of the Secretary to apportion overseas federal employees based on home of record, which created improper census counts, that the plaintiffs challenge in this case. That decision is plainly the type of "agency action" for which the Administrative Procedure Act provides judicial review. 5 U.S.C. §§ 551(4) & (13). The Secretary's decision, moreover, was certainly "final" for purposes of the APA at the time the overseas employees' data was incorporated into the apportionment counts. Abbott Laboratories v. Gardner, 387 U.S. 136, 151 (1967).

Moreover, the Secretary's decision cannot be characterized as an interpretation of the Census Act, or a "legislative"

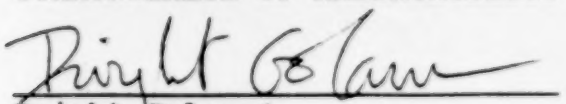
determination, as the appellees attempt to do at page 38 of their brief. To the extent that the Census Act gives the Secretary any authority to "legislate," it would be pursuant to 13 U.S.C § 141(f)(1)'s requirement that the Secretary promulgate rules for the conduct of the Census. But there are no formal regulations on this issue. Stip. 20 (J.A. 178). The only statement similar to a rule was the 1987 Policy Paper by the Census Bureau which stated that it would be arbitrary to apportion overseas employees. Joint App. 211-212. The Secretary's 1990 decision disregarded this "rule." Compare I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 486 n.30 (1987). Contrary to the Secretary's assertion, the decision to apportion overseas employees was a classic "interpretive" decision. See Skidmore v. Swift & Co., 323 U.S. 134, 139 (1944). Although achieved through informal procedures, the Secretary's decision is subject to review on the administrative record. See Florida Power & Light Co. v. Lorion, 470 U.S. 729, 743-45 (1985).

V. CONCLUSION.

For these reasons, the district court's decision should be affirmed.

Respectfully submitted,

SCOTT HARSHBARGER
ATTORNEY GENERAL
COMMONWEALTH OF MASSACHUSETTS



Dwight Golann*
Steve Berenson
Assistant Attorneys General
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2200, ext. 2068

*Counsel of Record

John P. Driscoll, Jr.
Edward P. Leibensperger
Neil P. Motenko
Special Assistant Attorneys General
Nutter, McClennen & Fish
One International Place
Boston, Massachusetts 02110
(617) 439-2000

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IN THE

Supreme Court Of The United States

October Term, 1991

BARBARA FRANKLIN, SECRETARY OF COMMERCE, *et al.*,
Appellants,

v.

COMMONWEALTH OF MASSACHUSETTS, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

BRIEF OF THE STATE OF NEW YORK AND THE PEOPLE OF THE STATE OF CALIFORNIA, EX. REL. DANIEL E. LUNGREN, ATTORNEY GENERAL, AS AMICI CURIAE IN SUPPORT OF APPELLEES

ROBERT ABRAMS,
Attorney General of the State of New York,
JERRY BOONE,
Solicitor General of the State of New York,
SANFORD M. COHEN*,
Assistant Attorney General in Charge, Civil Rights Bureau,
120 Broadway (23rd Floor),
New York, New York 10271
(212) 416-8240

Attorneys for the State of New York

THOMAS D. BARR,
ROBERT S. RIFKIND,
PHILIP C. KOROLOGOS,
CRAVATH, SWAINE & MOORE,
Worldwide Plaza,
825 Eighth Avenue,
New York, N.Y. 10019
(212) 474-1000

Of Counsel

DANIEL E. LUNGREN,
Attorney General of the State of California,
1515 K Street,
Sacramento, California
94102-3658
(916) 324-5437

Attorney for The People of the State of California ex rel. Daniel E. Lungren, Attorney General

April 13, 1992

*Counsel of Record

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INTEREST OF AMICI CURIAE

Pursuant to United States Supreme Court Rules 37.3 and 37.5, the State of New York and the People of the State of California, *ex rel.* Daniel E. Lungren, Attorney General, submit this brief as amici curiae in support of appellees Commonwealth of Massachusetts, *et al.*

California and New York have a direct and vital interest in the availability of judicial review to ensure that the decennial census mandated by the Constitution is taken in conformity with the Constitution and other requirements of law.[1] California and New York are the two most populous States in the Union. Their populations are also among the most diverse, containing large numbers of disadvantaged and minority groups.

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1 *See City of New York v. United States Dep't of Commerce*, 713 F. Supp. 48, 49-51 (E.D.N.Y. 1989) (California and New York have standing to challenge accuracy of census).

California and New York are currently involved in litigation with the Department of Commerce and the Census Bureau scheduled for trial May 11, 1992.[2] In that litigation, California and New York, joined by 5 other States, 27 cities and municipalities, and 12 organizations and individuals, expect to prove that the 1990 decennial census, like its predecessors at least as far back as 1940, undercounted large numbers of disadvantaged persons and minorities and, thus, undercounted substantial portions of the States and localities in which these persons are concentrated, resulting in a serious dilution of the political power of those areas and their citizens. Further, we expect to show that the Census Bureau recommended that the Secretary adopt significantly more accurate population data that would have substantially corrected the undercount and that the Secretary unreasonably rejected the recommendation of the expert agency. The corrected census would result in apportionment of Congress and congressional and State legislative districts more accurately reflecting the true distribution of the population and, thus, the principle of one person, one vote.

Appellants' contention that all judicial review of census related cases should be foreclosed would vest enormous, unchecked power in a federal bureaucracy. States and local entities as well as individual citizens, although critically dependent on the actions of this bureaucracy, would be blocked from seeking compliance with the Constitution. We submit that federal courts must be available to protect against violations of the most fundamental of constitutional rights. The unreviewable power that appellants would establish is inconsistent with our constitutional system of government.

SUMMARY OF ARGUMENT

The census is fundamental to the allocation of political power and the assurance of "fair representation". Distribution of representation within Congress, the Electoral College, and State

2 *See City of New York v. United States Dep't of Commerce*, 739 F. Supp. 761 (E.D.N.Y. 1990) (adjustment of census is a justiciable question); *City of New York v. United States Dep't of Commerce*, No. 88 CV 3474, slip op. (E.D.N.Y. Sept. 19, 1991) (denying defendants' motion to dismiss).

legislatures is dependent on this population determination. The efficacy of this Court's constitutional decrees in its apportionment decisions likewise depends upon an accurate census.

The issue here is whether the Secretary of Commerce may, with total immunity from judicial review, act arbitrarily, capriciously or in violation of the requirements of the Constitution. Appellants contend that claims that the Secretary so acted are not justiciable. Appellants do not identify any consideration remotely sufficient to justify the unique and drastic step of foreclosing judicial review in the face of threats to constitutional rights. We respectfully urge that this Court affirm the decision below sustaining the availability of federal judicial review of claims of unconstitutional or arbitrary and capricious conduct of the census.

We also urge that given the need for expedition in matters affecting apportionment, districting and the election process, the three judge court correctly concluded that remand of an invalidated decision to the Secretary of Commerce is not required.

ARGUMENT

I. THE CONDUCT OF THE CENSUS IS NOT IMMUNE FROM JUDICIAL REVIEW OF ARBITRARY, CAPRICIOUS OR UNCONSTITUTIONAL EXECUTIVE ACTION.

In establishing the federal legislature, the Framers adopted the "Great Compromise" under which the Constitution would protect the sovereignty of smaller States by granting each State an equal vote in the Senate, while at the same time ensuring that the "members of the House of Representatives should be chosen 'by the people of the several States . . . according to their respective Numbers'". *Wesberry v. Sanders*, 376 U.S. 1, 13 (1964) (quoting U.S. Const. art. I, § 2). To "ensure 'fair representation of the people'", the "Constitution embodied Edmund Randolph's proposal for a periodic census". *Id.* (quoting *The Records of the Federal Convention of 1787* at 580 (Farrand ed. 1911)).

This Court in a series of cases has enforced the "fair representation" standard to require that electoral "districts be apportioned to achieve population equality 'as nearly as is practicable'". *Karcher v. Daggett*, 462 U.S. 725, 730 (1983) (quoting *Wesberry*, 376 U.S. at 7-8) (congressional districts); *see, e.g., Chisom v. Roemer*, 111 S. Ct. 2354 (1991) (State Supreme Court electoral districts); *Board of Estimate of City of New York v. Morris*, 489 U.S. 688 (1989) (city board of estimate districts); *Connor v. Finch*, 431 U.S. 407 (1977) (State legislative districts); *Chapman v. Meier*, 420 U.S. 1 (1975) (same); *Hadley v. Junior College District of Metropolitan Kansas City, Mo.*, 397 U.S. 50 (1970) (junior college trustee districts). Despite repeated objections based on the political question doctrine, this Court has consistently held that the exercise of federal judicial power to ensure "fair representation" is both essential and proper. *See, e.g., United States Dep't of Commerce v. Montana*, No. 91-860, slip op. at 16-17 (U.S. March 31, 1992); *Davis v. Bandemer*, 478 U.S. 109, 123 (1986); *Wesberry*, 376 U.S. at 6; *Baker v. Carr*, 369 U.S. 186, 226 (1962).

The federal judicial review long deemed essential in the enforcement of "fair representation" in apportionment and districting cases is no less essential in challenges that the Secretary acted, with regard to the census, arbitrarily, capriciously or in violation of constitutionally protected rights. According to this Court:

> "The debates at the Convention make at least one fact abundantly clear: that when the delegates agreed that the House should represent 'people' they intended that in allocating Congressmen the number assigned to each State should be determined *solely by the number of the State's inhabitants.*"

Wesberry, 376 U.S. at 13 (emphasis added). Clearly, therefore, the determination of the number of the State's inhabitants must be accurate "as nearly as is practicable". *Wesberry*, 376 U.S. at 7-8.

Correction of fundamental inequities in the census may not be left solely to the executive and legislative branches. As the three judge panel in the case at bar held:

> "We blind ourselves, however, to the obvious if we do not recognize that the allocation of the House of Representatives is a matter of intense partisan, parochial and political interest. There is always the prospect that faced with such intense interest, traditional work-a-day rules of administrative law will be reformulated."

Massachusetts v. Mosbacher, No. 91-11234-WD, slip op. at 9, (D. Mass. March 13, 1992) (Appendix to Jurisdictional Statement at 92a).[3] The Framers did not believe that Congress could be relied upon to apportion itself. By stipulating both an objective means of apportionment and the decennial periods on which it shall be carried out, the Framers sought to depoliticize the process.[4] Enforcement of fundamental constitutional rights with respect to allocations of political power under the census must not be left without the possibility of judicial review. The plain need for judicial review of challenges to census enumer[illegible] no less compelling than the need, repeatedly recognized b[illegible] Court, for review of challenges to apportionment and districting.[5]

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3 Reliance on Congress as a corrective check fails to recognize "how futile it is to remit the disenfranchised for relief to the body which has failed to enfranchise them". Lewis, *Legislative Apportionment and the Federal Courts*, 71 Harv. L. Rev. 1057, 1092 (1958). "If a fair representation of the people be not secured, the injustice of the Govt. will shake it to its foundations." 2 *The Founders' Constitution*, art. I, § 2, cl. 3, No. 2 at 103 (Philip B. Kurland and Ralph Lerner eds., 1987) (statement of Edmund Randolph of Virginia). This proposition implicitly underlies a series of Supreme Court decisions adjudicating challenges to apportionment and districting. *See, e.g., Wesberry*, 376 U.S. at 14-15; *Baker*, 369 U.S. at 230; *cf. United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

4 This depoliticization was a conscious choice to avoid "the evils of the English system under which . . . 'rotten boroughs' with few inhabitants were represented in Parliament on or almost on a par with cities of greater population". *Wesberry*, 376 U.S. at 14-15.

5 Indeed, the lower courts have repeatedly held that the issues presented in challenging the census enumeration are justiciable. *Carey v. Klutznick*, 508

Appellants nonetheless contend that the political question doctrine requires that all judicial review of challenges to census accuracy be foreclosed (Jurisdictional Statement at 21-22). In *Montana* this Court held that the political question doctrine does not preclude judicial review of apportionment disputes even where an act of Congress is called into question. *Montana*, slip op. at 16-17. There is no more reason to allow that doctrine to preclude review of administrative decisions affecting the accuracy of the census, on which apportionment depends.[6] In *Baker*, this Court set forth the six limited circumstances where a political question may exist. 369 U.S. at 217. The three judge court below properly examined these six factors and found that they were "not a bar to our resolution of this dispute on the merits". *Massachusetts v. Mosbacher*, No. 91-11234-WD, slip op. at 25 (D. Mass. Feb. 20, 1992) (Appendix to Jurisdictional Statement at 25a).

To protect the core rights dependent on the census, and to provide the States with a means of enforcing the "Great Compromise" between them and the allocation of power for which it provides, this Court should affirm the decision of the three judge court below and make clear the propriety of federal judicial review of claims that the Secretary of Commerce acted arbitrarily, capriciously or in violation of constitutionally protected rights.

F. Supp. 404, 411 (S.D.N.Y. 1980) ("the precedents sustaining challenges to congressional redistricting should afford a predicate for finding the [census] claims before the court justiciable"); *see also City of New York v. U.S. Dep't of Commerce*, 739 F. Supp. 761, 765 (E.D.N.Y. 1990); *Carey v. Klutznick*, 637 F.2d 834, 838 (2d Cir. 1980); *City of Willacoochee v. Baldrige*, 556 F. Supp. 551, 557 (S.D. Ga. 1983); *City of Philadelphia v. Klutznick*, 503 F. Supp. 663, 674 (E.D. Pa. 1980); *Young v. Klutznick*, 497 F. Supp. 1318, 1326 (E.D. Mich. 1980), *rev'd on other grounds*, 652 F.2d 617 (6th Cir. 1981), *cert. denied*, 455 U.S. 939 (1982). *But see Tucker v. United States Dep't of Commerce*, No. 91-2051, slip op. (7th Cir. March 16, 1992), *petition for reh'g filed*.

6 As the court held in *Tucker*, No. 91-2051, slip op. at 8:

> "the political sensitivities that might have been thought to bring the apportionment cases within the scope of the political questions doctrine, but did not, are no greater [in the census context]."

II. THIS COURT SHOULD NOT REMAND INVALIDATED CENSUS DECISIONS TO THE SECRETARY OF COMMERCE.

This Court should also affirm the lower court's conclusion that remand of the matter to the Secretary of Commerce is not required. Challenges to the accuracy of the census systematically involve a pressing need for expedition.

In assessing the closely analogous question of the circumstances under which a party may properly avoid the requirement of administrative exhaustion, this Court acknowledged that a "prejudice may result . . . from an unreasonable or indefinite time frame for administrative action" and that the danger of such prejudice would "weigh heavily against requiring administrative exhaustion". *McCarthy v. Madigan*, 112 S. Ct. 1081, 1087 (1992); *see also Coit Independence Joint Venture v. FSLIC*, 489 U.S. 561, 587 (1989); *Gibson v. Berryhill*, 411 U.S. 564, 575 n.14 (1973). This Court further acknowledged that, even when the timing of administrative decision making is not facially unreasonable, the particular circumstances of the plaintiffs may be such that they will suffer "irreparable harm if unable to secure immediate judicial consideration of [their] claim". *McCarthy*, 112 S. Ct. at 1087. *McCarthy* makes clear that in such circumstances this Court would deem exhaustion inappropriate. *Id.* at 1087-88.

Requiring remand of invalidated census decisions to the Secretary could make relief wait upon an "indefinite time frame" and threaten plaintiffs with irreparable injury from any substantial additional delay. In short, remand to the Secretary would result in deprivation of the rights sought to be vindicated.

CONCLUSION

Amici respectfully request this Court to affirm the availability of federal judicial review of challenges that the Secretary of Commerce acted arbitrarily, capriciously or in violation of constitutionally protected rights and to affirm that invalidated census decisions need not be remanded to the Secretary.

Respectfully submitted,

ROBERT ABRAMS,
Attorney General of the State
of New York,
JERRY BOONE,
Solicitor General of the State
of New York,
SANFORD M. COHEN*,
Assistant Attorney General in charge,
Civil Rights Bureau,
120 Broadway (23rd Floor),
New York, N.Y. 10271
(212) 416-8240

Attorneys for the State of New York

THOMAS D. BARR,
ROBERT S. RIFKIND,
PHILIP C. KOROLOGOS,
CRAVATH, SWAINE & MOORE,
Worldwide Plaza,
825 Eighth Avenue,
New York, N.Y. 10019
(212) 474-1000

Of Counsel

DANIEL E. LUNGREN,
Attorney General of the State
of California,
1515 K Street,
Sacramento, California 95814
(916) 324-5437

Attorney for The People of the State of California ex rel. Daniel E. Lungren, Attorney General

April 13, 1992

*Counsel of Record

(5)

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OCTOBER TERM, 1991

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v.

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KENNETH O. EIKENBERRY
Attorney General
JAMES M. JOHNSON*
Sr. Assistant Attorney General
J. LAWRENCE CONIFF
JEFFREY T. EVEN
CAROLE A. RESSLER
Attorneys
Attorneys for Amicus Washington
*Counsel of Record

Highways-Licenses Building
7th Floor P.O. Box 40100
Olympia, Washington 98504
(206) 753-4556

4818

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J. LAWRENCE CONIFF
JEFFREY T. EVEN
CAROLE A. RESSLER
Attorneys
Attorneys for Amicus Washington
*Counsel of Record

Highways-Licenses Building
7th Floor P.O. Box 40100
Olympia, Washington 98504
(206) 753-4556

QUESTIONS PRESENTED

The three-judge district court held that the Census Clause of the Constitution (Art. I, § 2, Cl. 3) and the Census Act (13 U.S.C. § 141) permit the Secretary of Commerce to include federal personnel stationed abroad (and their dependents) in the state population totals on which the apportionment of Representatives is based. However, the court held that the Secretary's manner of doing so following the 1990 census was arbitrary and capricious, in violation of the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A), because he did not furnish an adequate justification. The questions presented are:

1. Whether judicial review of the apportionment of Representatives, based on the census including federal personnel stationed abroad, is barred by virtue of the political question doctrine, the APA's exceptions for situations in which "statutes preclude review" and "agency action is committed to agency discretion by law," 5 U.S.C. 702(a), and the inapplicability of the APA to the President.

2. Whether, if judicial review is not barred the inclusion of federal personnel stationed abroad was arbitrary and capricious.

3. Whether, if the district court correctly found that the Secretary's determination violated the APA, it properly ordered appellants to effect a new apportionment of Representatives with the personnel abroad thrown out of the underlying census count, rather than remanding the matter to the Secretary for further proceedings.

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BRIEF OF STATE OF WASHINGTON AS AMICUS IN SUPPORT OF APPELLANTS

INTERESTS OF AMICUS WASHINGTON

The State of Washington participates herein to protect the nine United States House of Representatives seats to which it is "entitled" (2 U.S.C. § 2a) under the Certificate of Entitlement

issued by the Clerk of the House following the 1990 Census.[1] The order below transfers one of these seats to Massachusetts and also reduces by one the number of Washington's presidential electors.

Washington also acts to protect the rights of 922,819 United States citizens who, because they were serving their country overseas on the day of the census, have been ordered treated as nullities for constitutional apportionment purposes by the district court.

Finally, Washington acts to protect the rights of its citizens whose share of representation in the House of Representatives would be diluted (reduced by 11%) by the lower court's order reducing the Washington delegation from nine to eight.

A. Washington's Interest in Retaining Nine House Seats and Declaring the Process Final

"The 1990 census revealed that the population of certain States . . . had increased more rapidly than the national average . . . [which] caused 8 states to gain . . . additional seats in the House of Representatives and 13 states to lose an equal number." *U. S. Dep't of Commerce v. Montana*, No. 91-860, slip. op. at 2 (U.S. Mar. 31, 1992). Washington, a rapidly growing state, gained one seat (to nine) and Massachusetts, a state of relative decline, lost one seat (to ten). *Montana*, slip op. at 2, nn.4, 5.

Massachusetts (belatedly) filed this action in an attempt to reverse or delay the effects of these population changes on its congressional delegation.

Because Washington's ninth seat was the last seat allocated under the 1990 apportionment (number 435), two of the legal challenges filed by states losing seats have sought the seat gained by Washington.[2]

In this action the United States District Court for the

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[1] Washington's Certificate dated January 16, 1991 is appended as Appendix A.

[2] First considered by this Court was *United States Department of Commerce v. Montana*, No. 91-860 (U.S. Mar. 31, 1992).

District of Massachusetts issued an order excluding from the census for apportionment purposes, the approximately 922,819 federal employees serving overseas on the census date, and directing the Clerk to issue new Certificates of Entitlement with the effect of taking a seat from Washington, and giving it to Massachusetts. Washington has an interest in reversing that decision, in order to retain its nine House seats (and the presidential electors based on House and Senate delegations). Washington also advocates the strong public interest in finality of the apportionment process.

In Washington, as in a majority of states,[3] redistricting into congressional, and intertwined states districts, is now final (as required by the Washington Constitution) and its Redistricting Commission is no longer in operation.

Preparations for the 1992 congressional and other elections are already in progress, both by the State and by the various candidates. Candidates have declared and filed public disclosure and financial reporting statements.

The Massachusetts court order would have the probable effect of making it impossible for Washington to conduct its elections in accordance with its laws.[4]

B. Washington's Interests Include the Constitutional Rights of Affected Citizens Serving Overseas

Of arguably greater importance, Washington argues herein on behalf of the over 922,819 citizens declared nullities for apportionment by the decision below. Approximately 21,249 of those citizens are Washingtonians by selection of Washington as a "home of record" when entering government service. However, the decision below denied representation to all citizens who happened to be serving their country in an overseas

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[3] Only nine states are still redistricting. *See* App. B.

[4] Massachusetts has previously suggested (Brief opposing stay, p. 22) Washington should conduct elections from old districts. Those districts would be unconstitutional under *Wesberry v. Sanders*, 376 U.S. 1 (1964), standards.

location--often at the order of the President as Commander-in-Chief--on the day of the census.

Washington speaks for the rights of its citizens so situated and those of all states. Neither the United States nor Massachusetts even purports to do so. The court below disregarded the rights of all such citizens in its rush to add back a Massachusetts seat. It will be demonstrated, infra at p. 24, that denying representation under such circumstances is unconstitutional as a violation of the equal protection concepts of the Fifth Amendment. Totally refusing to count these citizens has the effect in this case, of reducing the Washington delegation to eight, thus reducing the "share of a representative"[5] for both the military personnel in question and for other citizens of the state.

STATEMENT OF THE CASE

The Census of the United States was conducted as of April 1, 1990. 13 U.S.C. § 141(a). Nearly nine months before (July 31, 1989), however, all states had been advised of the final decision of Commerce that overseas federal employees would be counted in the 1990 Census. J.A. 511-512.

Neither Massachusetts nor any representative complained or moved to legally challenge this decision. Indeed, the House, on June 26, 1990, passed on consent HR 4903 to prohibit census exclusion of military personnel stationed outside the United States and to direct "home of record" be used in counting. There was no recorded dissent from Massachusetts' representatives. 136 Cong. Rec. H 4195-4197.

It seems likely that such a bill would have passed, were it not for the decision of the Secretary of Commerce to order the counting of the overseas citizens and the later determination to utilize the "home of record." J.A. 919-920. The conclusion, and its reasoning were communicated to Congress and the public on July 23, August 7, and September 11, 1990. J.A. 925, 931-32.

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[5] "Share" is one measure of fairness in apportionment. *Montana*, slip op. at 11-2, defined at n.28.

On December 26, 1990, the census results, including overseas federal employees were reported to the President as required by the statute. On January 3, 1991 (the first day of the 102nd Congress), the President transmitted to Congress a report showing the results of the 1990 Census, and the number of representatives to which each state was entitled.

On January 16, 1991, the Clerk of the House of Representatives transmitted to each state a Certificate of Entitlement to that number of representatives as required by 2 U.S.C. § 2a(b). Massachusetts is entitled to ten, and Washington to nine under their respective Certificates. (Washington's certificate is attached as Appendix A.)

Nearly two years after the decision to include citizens temporarily overseas, and four months after receiving its Certificate, Massachusetts filed this action on May 12, 1991. Washington moved to participate as an amicus, specifically noting its refusal to waive sovereign immunity to be sued and that it was an indispensable party in any suit to take a Washington House seat.

Washington later argued amicus that it was unconstitutional to deny representation of citizens whom the United States had ordered temporarily out of country, describing the Massachusetts theory as "one man no vote."

On summary judgment, the Massachusetts court required the results of the census be recomputed by the Executive to exclude government employees temporarily overseas on April 1, 1990. These are mostly military, though thirty agencies have such employees. The Executive (President) was ordered by the Massachusetts court to submit a new statement to Congress, showing the number of representatives to which each state would be entitled if these counts are excluded. The court also ordered the Clerk of the House to "send the executive of each state a recertification of the number of Representatives to which such state is entitled . . .."[6] J.S. App. 95a.

The parties below, which did not include Washington, had

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[6] This relief, ordering the Clerk to issue new Certificates, was not requested in Massachusetts' Complaint. Washington is an indispensable party in any suit to change its certificate.

stipulated that absent the inclusion of those federal employees, Washington would be entitled to only eight representatives. While Washington does not concede this is true, it is the potential loss of one of its House seats that prompts participation here.[7]

These orders of the court below were stayed by this Court on March 27, 1992.

The Washington Redistricting Process is Final

The Certificate of Entitlement to nine House seats was transmitted to the Washington Redistricting Commission. Wash. Const. art. II, § 43, amend. 74.

The Commission redistricted Washington into the nine United States House districts (and intertwined state legislative districts). The Redistricting Plan was completed and filed on January 1, 1992. It is now final. Wash. Rev. Code § 44.05.100 (1983). The Washington Legislature, like the Redistricting Commission, is now out of session.

Washington's elections system, including its participation in the nominating process for United States President, has proceeded. Candidates for federal, state and local offices have commenced organizing, raising and spending money (and filing Public Disclosure Reports). The caucuses of the major political parties were held on March 3, 1992. These are the first level of selection of delegates to the national conventions.

Washington has proceeded in good faith following the Statement by the President and issuance of its Certificate of Entitlement by the Clerk of the United States House, both confirming entitlement to nine congressional seats (and districts).

Other states have acted similarly. As of the filing of this Brief over thirty-four states had completed redistricting based on the Census results and Certificates of Entitlement. Seven more

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[7] Washington is willing to intervene on remand to contest the factual basis for the total exclusion, and establish correct populations. Note too an "adjustment" to the Census as sought in *New York v. United Stated Department of Commerce*, 713 F. Supp. 48 (1989) (trial pending) would add over 100,000 to Washington including this case.

(with a single House seat) have done legislative redistricting. They have relied on the Census results all have assumed were final. *See* App. B.

SUMMARY OF ARGUMENT

I. A. The Constitution gives Congress express authority to direct the conduct of the decennial census. U.S. Const. art. I, § 2, cl. 3. Congress has delegated this authority to Commerce which is to conduct the Census "in such form and content as he may determine . . .." 13 U.S.C. § 141(a). The Census is statutorily required to be reported to the President on a specific date (this decade, Dec. 26, 1990). 13 U.S.C. §141(b).

The President is statutorily required to report to Congress the Census and the apportionment of House seats to states on the first day of Congress (or within one week). 2 U.S.C. § 2a(a). This was done, as required, on January 3, 1991.

B. Thereafter, the apportionment, including issuance of Certificates of Entitlement to each state, is exclusively a matter for Congress. The district courts had no authority to interfere, especially where, as here, the Congress (House Clerk) properly issued Certificates to each state on January 16, 1991 as required by statute. 2 U.S.C. § 2a(b).

The court order below, directing new Certificates be issued, is also improper because predicated on the Administrative Procedure Act (Act). That Act provides cause of action neither against the President, nor against Congress which is specifically exempted. 5 U.S.C. § 701(a)(1)(A).

The statute under which the House Clerk acted does not authorize any change in Certificates once issued. 2 U.S.C. 2a(b). Legislative history confirms this conclusion. Only on one occasion have Certificates been changed once issued, and that required an explicit act of Congress.

II. Here, the Secretary of Commerce' decision to count overseas military, and to use "home of record" is clearly within the delegated discretion, and indeed is required. Congress both encouraged and directed these decisions (and probably would have required it by law, had the Secretary not so acted).

The court below either overlooked, or disregarded

important parts of the Administrative Record which supported (mandated) the Secretary's decision. This Record importantly included a study by Congress itself (Congressional Research Service), analyses by staff at the census and Secretary level, and direct Congressional input.

The necessary conclusion from the Administrative Record was that counting the overseas military was practical and appropriate, and that "home of record" provided the most accurate data and conforms closely to the usual residence of the Census.

Congress' and the states' treatment of these same individuals for voting parallels the methodology chosen by Commerce; these persons generally vote at the same place as their "home of record" The Washington State Constitution protects the right to do so. Wash. Const. art VI, § 4. The federal Overseas Citizens Absentee Voting Act provides similar protections. 42 U.S.C. §§ 1973ff-1973ff-6.

III. The court order that such persons be treated as nullities for apportionment purposes, because of their serving the country overseas, violates Constitutional Rights of these citizens and of the states. The equal protection component of the Fifth Amendment prohibits the federal government from such discrimination. *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Buckley v. Valeo*, 424 U.S. 1 (1976). Strict scrutiny is the standard to apply, and Massachusetts has shown no compelling reason for this discrimination.

The result also violates the right of the states to have their citizens counted. Article 1, Section, 2 Clause 3 was written to count for apportionment all "persons," expressly to be inclusive of all inhabitants. 1 Max Farrand, *The Records of the Federal Convention of 1787* 35 (1911).

The first Census Act spoke of counting "inhabitants." 1 Stat. 101 (1790). As Madison had noted in 1787, when discussing qualifications for House membership, inhabitants "would not exclude persons absent occasionally for a considerable time on public or private business." 2 *Id.* at 217.

ARGUMENT

I. The 1990 Census and Apportionment of Representatives is Final, and is Not Now Subject to Review

A. The Manner of Conduct of the Census is Constitutionally Committed to Congress. Once Reported to Congress it is Final

Article I, Section 2, Clause 3 directs that the "enumeration shall be made . . . in such manner as [Congress] shall by law direct." The Census was conducted by Commerce under the broad delegation of authority in 13 U.S.C. § 141(a). The Statement of the President showing the census results and the resulting apportionment was reported to Congress on January 3, 1991 as required by 2 U.S.C. § 2a(a).

Once the President's Statement is received in Congress, any review of, or change in the census or apportionment is exclusively committed by Constitution and statute to Congress.[8]

A federal court has no jurisdiction or authority to order Congress to change its own apportionment--where, as here, there is alleged no constitutional violation.[9] This distinguishes Massachusetts' case from the challenge to apportionment in the recent *Montana* case. *U.S. Dep't of Commerce v. Montana*, No. 91-860, slip op. at 2 (U.S. Mar. 31, 1992). There, a constitutional violation was alleged which called for this Court's interpretation of the constitutional provisions applicable. The *Montana* claim involved "determining that specific congressional

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[8] "The Constitution squarely places sole responsibility for this fundamental function of government (apportionment of House seats) on the Congress." *Tucker v. U.S. Dep't of Commerce*, No. 91-2051, slip op. at 16 (Ripple, J., concurring) (7th Cir. Mar. 16, 1992).

[9] Massachusetts' claim below that the inclusion of the overseas military violated the Constitution was rejected by the district court. "Thus we do not find persuasive plaintiff's argument that the Secretary's overseas census decision was unconstitutional on its face." J.S. App. 81a. Massachusetts did not appeal that ruling.

action does not violate the Constitution" and thus "turns on the proper interpretation of the relevant constitutional provisions." *Montana*, slip op. at 19.

The statutory scheme here, with explicit deadlines contained in 2 U.S.C. § 2a requires the conclusion that the census and apportionment are intended to be final upon the expiration of those dates. Massachusetts inexcusably waited far too long to bring its challenge. It will be further indicated below why that challenge must fail.

There are many policy reasons supporting Congress' decision to make the process final at a specified date. There can be no doubt of Congress' constitutional responsibility for conducting the census and plenary authority to make it final. *Baldridge v. Shapiro*, 455 U.S. 345 (1982).

This finality in congressional apportionment is of great public interest because it would be harmful and disruptive to permit continuous challenges to the highest representative political authority. Both federal and state courts recognize that there should be finality in political processes, especially procedures relating to elections, *e.g. Morgan v. United States*, 801 F.2d 445, 450 (D.C. Cir. 1986), *cert. denied*, 480 U.S. 911 (1987) ("The pressing legislative demands of contemporary government have if anything increased the need for quick, decisive resolution of election controversies").

Appendix B shows the number of states that have concluded redistricting (or have one seat (41)). Changes to the Census or apportionment results *could* impact all states, though Washington is most directly affected herein.

To take a seat from Washington now would be especially disruptive, requiring redistricting efforts to start again. In the interest of preserving the integrity and finality of the apportionment process, the Clerk should not now be ordered to revoke or modify any state's Certificate. These public consequences justify reversing the district court's order. *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982).

It is also important to consider that other challenges could follow Massachusetts'; as other states find elements of the census methodology that, if changed, could enure to their benefit in a number sufficient to reclaim a "lost" House seat. Such problems

are foreseeable, and justify Congress in setting deadlines, after which, apportionment is irrevocable.

B. The Court Improperly Ordered the House to Change Each State's Certificate

1. The APA Provides No Cause of Action Against the President or Clerk

The court below relied upon the Administrative Procedure Act (APA), as the sole cause of action to support the relief below.[10] However, the APA does not apply to the Clerk of the United States House, nor to the President–both of whom were ordered to perform affirmative acts as integral parts of the relief below.

Neither of these defendants is an "agency" within the meaning of the APA. *Armstrong v. Bush*, 924 F.2d 282 (D.C. Cir. 1991), reached the specific conclusion the President was not an "agency." The Clerk of the House is also not subject to APA review. Under 5 U.S.C. 701, "Agency . . . does not include (A) the Congress . . ." 5 U.S.C. § 701(a)(1)(A).

The APA does not support the relief granted against the President or House Clerk.

2. The Clerk Lacks Statutory Authority to Revoke or Modify Certificates of Entitlement

2 U.S.C. § 2a(b) provides that the Clerk *shall* issue a Certificate within fifteen days after receiving apportionment figures from the President. It does not authorize the revocation or modification of a Certificate once it has been issued.

The word "shall" in statutory parlance is mandatory language. *Board of Pardons v. Allen*, 482 U.S. 369, 374 (1987).

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[10] The opinion concluded: "we . . . ALLOW plaintiffs' motion for summary judgment as to the overseas census claim grounded upon a violation of the Administrative Procedure Act." J.S. App. 84a. As noted, (*infra*, n.9) the constitutional claim was denied.

The statute even goes on to specify who "shall" perform this duty if the Clerk does not:

> In case of a vacancy in the office of the Clerk, or of his absence or inability to discharge this duty, then such duty shall devolve upon the Sergeant at Arms of the House of Representatives; and in case of vacancies in the offices of both the Clerk and the Sergeant at Arms, or the absence or inability of both to act, such duty shall devolve upon the Doorkeeper of the House of Representatives.

2 U.S.C. § 2a(b).

Where statutory language is unambiguous, in the absence of a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive. *United States v. Turkette*, 452 U.S. 576, 580 (1981). A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning. *Perrin v. United States*, 444 U.S. 37, 42 (1979).

The plain language of 2 U.S.C. §§ 2a(a) and 2a(b) indicates that the Clerk must issue Certificates in accordance with the President's Statement and has no authority to revoke or modify an issued Certificate. The legislative history of the statute confirms that the Clerk cannot, without explicit statutory authority, revoke or modify the Certificate.

Each state is "entitled" to the number of seats shown in the President's Statement and indicated in its respective Certificate until the taking effect of a subsequent reapportionment. 2 U.S.C. §§ 2a(a), 2a(b). To interpret the statutes to allow the Certificate to be changed would render this "entitlement" language meaningless. It is in the nature of a vested right, upon which all states are entitled to rely in redrawing their congressional districts.

The vesting of each state's entitlement probably occurs at the time the President's Statement is filed with the Congress; surely it vests when the Certificate is actually issued and received.

The Clerk has no authority to revoke or modify a Certificate and may not be ordered to perform an act he has no authority to perform.

3. Legislative History Confirms That the Certificates of Entitlement are Irrevocable (Absent Congressional Action)

There is only one historical instance in which a state was denied a seat to which it was entitled according to a Certificate. An explicit act of Congress was required to take away the seat.

In 1941, Congress debated amendments to 2 U.S.C. § 2. The President had already reported the 1940 census results to the Congress and certificates had been issued. The result was explained on the Senate floor:

> [T]he statute made reapportionment by so-called major fractions final and conclusive and binding upon all concerned. The case was closed; the incident was finished; and the Clerk of the House so notified the States.

87 Cong. Rec. 8053 (1941) (Statement of Senator Vandenberg).

The method of apportionment was changed, and "equal proportions" accepted. However, a specific act of Congress was required to change the States' entitlement under already-issued certificates. The debate confirmed the general proposition of our argument here: unless Congress specifically acts, the Certificates are final. 87 Cong. Rec. 8078-83 (1941). Congress voted to specifically require new Certificates. Section 2b of the Act of November 15, 1941 provided as follows:

> (b) If before the enactment of this Act a certificate has been sent to the executive of any State . . . as in force before the enactment of this Act, the Clerk of the House of Representatives shall, within fifteen calendar days after the date of enactment of this Act, send a new certificate to such executive stating the number of Representatives to which State is entitled under this

section.

Pub. L. No. 87-291; 55 Stat. 761, 762 (1941) (originally codified as 2 U.S.C. § 2b).

Congress' action in 1941, and the legislative history surrounding it, confirms that a Certificate of Entitlement cannot be revoked or modified by the Clerk unless and until Congress enacts legislation to that effect. A court may not order the Clerk to perform beyond his statutory authority.

C. Whether to Change Congress' Certificates of Entitlement Apportioning Representatives Among the Several States is a Political Question

Massachusetts filed this action ultimately seeking an extra House seat. First, the President was ordered to make a new report to Congress providing eleven House seats for Massachusetts. Then the House Clerk was ordered to issue (all) new Certificates of Entitlement with Massachusetts' and Washington's changed.

Each of these steps involves reversing actions of the separate branches of government, which had long become final. The case clearly involves nonjusticiable political question(s).

This Court has said that:

> In determining whether a question falls within [the political question] category, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations.
>
> The nonjusticiability of a political question is primarily a function of the separation of powers.

Baker v. Carr, 369 U.S. 186, 210 (1962) (citation omitted).

The Executive's final action occurred when the President certified the final census results of the 1990 Census, including states' apportionment, to the Congress on January 3, 1991 (the

first day of the 102nd Congress). 2 U.S.C. § 2a(a).

The Legislative Branch has also taken its final action. The Clerk of the House sent each state its Certificate of Entitlement on January 16, 1991. 2 U.S.C. § 2a(b). On their face, and by statute, these Certificates are final until the next decennial census and apportionment. In affirming dismissal of another challenge to the 1990 Census and apportionment, one judge noted:

> [I]n my view, to the extent that the plaintiffs seek a redetermination of the Congress' apportionment of the seats of the House of Representatives, this suit presents a nonjusticiable political question. *See Baker v. Carr*, 369 U.S. 186 (1962); *Coleman v. Miller*, 307 U.S. 433 (1939). The Constitution squarely places sole responsibility for this fundamental function of government on the Congress.

Tucker v. U.S. Dep't of Commerce, No. 91-2051, slip op. at 16 (7th Cir. Mar. 16, 1992) (Ripple, C.J. concurring).

It should be also noted that there are "policy choices and value determinations" tied to conduct of the census which are "constitutionally committed for resolution to the halls of Congress . . .." *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 (1986). These decisions were, in turn, delegated to Commerce. Such issues do not lend themselves to judicial resolution.

A last observation of *Baker* is also relevant to the finality argument. "The political question doctrine, [is] a tool for maintenance of government order, [and] will not be so applied as to promote only disorder." *Baker*, 369 U.S. at 215.

Most states already redistricted, creating congressional districts intertwined with legislative and local districts, raising questions of when states may rely on finality of congressional and executive process. In Washington and other states, a change at this late date would disrupt the political process, probably making it impossible to conduct 1992 elections in accordance with statutory deadlines. If not dictating abstention, these considerations should support deferring to other branches.

II. The Secretary of Commerce Acted Within and in Accordance with Congress' Delegation of Census Authority

Congress has vested broad discretion in the Secretary of Commerce to conduct the census "in such form and content as he may determine . . ." 13 U.S.C. § 141(a). The Secretary acted within this discretion in deciding to include overseas federal employees, in the count for apportionment purposes. A predecessor made the same decision in 1970.[11] The court below necessarily rejected the argument that such inclusion violates the Census Act concluding the Secretary has such discretion. J.S. App. 81a, n.31.

Still, the court concluded that the Secretary's decision was an abuse of that discretion and issued a court order denying representation to those serving their country overseas. That decision not only offends traditional notions of representation,[12] but contradicts the intent of Congress. Congress' only explicit expressions of opinion or oversight directed the Secretary to implement such inclusion[13] (*see supra* p. 4 HR 4903 and *infra*

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[11] *See Borough of Bethel Park v. Stans*, 449 F.2d 575, 581 (3rd Cir. 1971) (noting inclusion of overseas federal employees "was prompted by a recommendation of the House Subcommittee on Census and Statistics which demonstrated concern over the large number of Federal Government employees serving overseas at the time of the 1970 Census.")

[12] Contrast this with the counting of illegal aliens and convicts. *Infra* at 24. One Representative (Roberts) spoke of "a very serious problem . . . overseas among the military and Federal civil service . . . of feeling disenfranchised, of being second class citizens, not having access to the system in which they really want to participate." *Uniformed and Overseas Citizens Absentee Voting: Hearings on HR 4393 Before the Subcomm. on Elections of the Committee on House Administration, U.S. House of Representatives*, 99th Cong., 2d Sess. 39, 68 (1986).

[13] As noted in n.11, a similar decision in 1970 was prompted, in part, by similar direction from Congress.

pp. 18-19). When Congress provided for protection of the voting rights of these overseas federal employees (42 U.S.C. §§ 1973ff-1973ff-6), Congress adopted a procedure similar to that followed by the Census Bureau in counting these same persons. The Census Bureau did not act arbitrarily in allowing voters to be counted for apportionment purposes on a similar basis.

A. The Lower Court Ignored the Record Basis for the Decision to Use "Home of Record"

The lower court agreed the Secretary possesses broad discretion under both the Constitution and relevant statutes. J.S. App. 79a. The court concluded that the Secretary's decision was arbitrary and capricious solely because the Department of Defense (DOD) ultimately did not conduct a census of its employees concurrently with the originally scheduled national census. *Id.*, 75a.

The lower court's consideration of the Administrative Record stopped at DOD's December, 1989 decision not to undertake a separate census count. A.R. 787. This is the last record cite in the decision.

Given a fair reading this entire Record documents that the Secretary, and his staff, carefully considered whether or not to include overseas personnel and what data would be used. *See, generally*, A.R. 788-949, J.A. 811-12, 826-31, 834-35, 872-82, 919-21, 924-25, 931-32, 943-45.

A brief summary of the major elements of the Secretary's reasoned consideration of this question is appropriate here. Each piece of correspondence, memo, or report obviously documents more lengthy study and consideration:

- Extensive correspondence between Commerce and Congress considered whether, and how, to count those overseas. A.R. 830-33, 925-27, 931-47; J.A. 811-12, 830-31, 925, 931-32, 943-45.

- Staff memoranda analyzed these subjects: (a) counting overseas military comparing "home of record" vs. "last six months residence." J.A. 826-

829. (b) H.R. 4903 which required use of home of record data. A.R. 862. (c) the proposed use of home of record data in 1990 census. J.A. 920-921.

- Thirty-five page Congressional Research Service Report (Huckabee, *The 1990 Census: Including Foreign-Based Military and Civilian Personnel in the State Counts* (CRS Study)) dated June 20, 1990 analyzed three alternative data sources. A.R. 872-907; J.A. 872-82.[14] These are (1) home of record; (2) legal residence--six months duration; and (3) last duty station. The home of record is recommended as the preferred reliable data source.[15]

- Department staff recommendation (and approvals) articulated reasons to use home of record data: "We believe that the new 'home of record' data supplemented with additional information DOD plans to collect will satisfy our criterion that the best quality data be used for the 1990 census." J.A. 919.

- Staff memorandum advised the Secretary that the technical staff of the Census Bureau "believes that the Home of Record comes closest to the concept of the usual residence among the three data sources that DoD has available." J.A. 924.

- Finally, DOD agreed to assure that home of record data would satisfy Commerce' criterion for best

[14] Not all of the A.R. is included in the J.S., *e.g.*, 25 pages of appendices to this study were omitted.

[15] This study alone is probably sufficient record for the Secretary's decision--given the source was the same source of his delegated authority. *See Montana*, slip. op. at 8-13 (describing a National Academy of Sciences Report on apportionment methodology as one appropriate decisional basis.

quality data as "supplemented and improved by methodologies devised by technical experts who originally designed the overseas enumeration." J.A. 919-21, 925, 931.

The court below erred by failing to give deference to the Secretary's reconsideration and decision as documented in this record, in accordance with normal APA judicial review standards.

The legitimacy of our representative institutions depends upon the premise that all persons are treated as politically equal. The central census issue is how to provide the best possible numbers. The guidelines determined in advance by the Secretary, in cooperation with DOD, created the necessary environment for a decision free of the influence of any individual or group who may have a political, financial or other stake in the outcome. Not surprisingly, there was little (no) dissent from the Secretary's decision until this action.

Conversely, total exclusion of people who are entitled to be counted is the result of the decision below. Massachusetts (and the court below) ignores the most accurate numbers available and replaces these data with a zero. This is a misapplication of the principles of *Karcher v. Daggett*, 462 U.S. 725 (1983). A proper application of the constitutional principles to the overseas personnel counting issue is to give weight to the most accurate numbers possible under current methodology. The goal of providing equal representation in Congress is not served by denying the best available figures any validity whatsoever. *City of Newark v. Blumenthal*, 457 F. Supp. 30, 34 (D.D.C. 1978).[16] There is no dispute that there are numbers of American citizens temporarily overseas who are entitled to vote in the next election. Massachusetts would say--do not count any of these for representational purposes. This is not a rational solution to the problem, nor does it comport with the considered solution reached by the Executive Branch (with the prodding of the Legislative Branch which is constitutionally authorized to

[16] Cited with approval for this proposition in *Karcher v. Daggett*, 462 U.S. at 738.

"direct" the census).

B. Congress Encouraged and Directed the Secretary's Decision to Include Federal Overseas Personnel by "Home of Record"

This Court observed, in its recent decision, *U.S. Dep't of Commerce v. Montana*, No. 91-860, slip. op. (U.S. Mar. 31, 1992):

> Our previous apportionment cases concerned States' decisions creating legislative districts; today we review the actions of Congress. Respect for a coordinate branch of Government raises special concerns not present in our prior cases, but those concerns relate to the merits of the controversy rather than to our power to resolve it.

Montana, slip. op. at 17.

The lower court did not have the benefit of this admonition. Rather, the court below obliquely referred to this issue by concluding that the Secretary's reliance upon bipartisan expressions of congressional concern was not an "improper factor." J.S. App. 73a-75a. This is a far cry from judicial deference to considered decisions reached by separate but coordinate branches of government which resulted in the use of home of record data for apportionment in the 1990 Census.

As the Administrative Record demonstrates, the Secretary considered alternative data sources for use in counting overseas personnel and ultimately concluded that it would be consistent with his statutory responsibilities to use home of record data (with certain adjustments) for counting overseas personnel for the 1990 Census.

The record clearly shows a series of reasoned responses by the Executive Branch to criticism, comment and recommendations from the Legislative Branch exercising its oversight responsibilities. Such expressions of legislative will and of executive responses are entitled to deference by the Judicial Branch. As Mr. Chief Justice Taft observed in *Hampton*

& Co. v. United States, 276 U.S. 394, (1928):

> This is not to say that the three branches are not co-ordinate parts of one government and that each in the field of its duties may not invoke the action of the two other branches insofar as the action invoked shall not be an assumption of the constitutional field of action of another branch. In determining what it may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental co-ordination.

Id. at 406.

Nixon v. Administrator of Gen. Servs., 433 U.S. 425 (1977) stated that the Judicial Branch should give deference to decisions made by other branches. *Id.* at 443, citing *United States v. Nixon*, 418 U.S. 683, 703, 711-12 (1974). *Accord Mistretta v. United States*, 488 U.S. 361, 380-84 (1989).

The court below erred by failing to give deference to the reality-based interaction between Congress in the exercise of its oversight powers and the Secretary's exercise of executive powers. The three branches of government must work together with reciprocity. *Nixon*, 433 U.S. at 442-43. While this Court has ultimate jurisdiction to decide constitutional questions, each branch of government has the right to determine its powers and that determination is "due great respect." *Id.* The lower court's application of APA standards to the use of home of record data does not show "great respect" on the part of the Judicial Branch for a jointly arrived at decision of the Legislative Branch and the Executive Branch. This is especially true here, where the subject of census and apportionment is explicitly entrusted to Congress by the Constitution.

C. The Court Misunderstood "Home of Record"

The Commerce Department determined that the most accurate method to allocate overseas serving persons was data showing "home of record." The district court claimed that the

data was inaccurate because "home of record" could be chosen for tax reasons. J.S. App. 76-77a. This is simply untrue. Home of record is defined as, "the place recorded as the home of the individual when commissioned, appointed, enlisted, inducted, or ordered into the relevant tour of active duty." *Joint Federal Travel Regulations*, ch. 56, App. A.[17]

Home of record is not used by the Defense Department for the designation of the state to which an employee pays taxes. "Legal residence" is used for taxes. *Department of Defense Military Pay and Allowances Manual*, § 70105 (defining "legal residence," which is to be used for tax purposes).

The Census Bureau specifically rejected using "legal residence" as the primary method of determining a home state for precisely that reason. J.A. at 921.

Home of record represents not the whimsical election of a home state suggested by the district court, but rather the "reflect[ion of] the person's own concept of his or her home State," at the last time this was a matter of choice. Huckabee, *CRS Study*. J.A. at 879.

That home of record best reflects the state the service member thought of as home before entering the military is made clear by military form (DD 1966). The instructions tell applicants to provide the address "declared by you to be your permanent or actual home at time of enlistment. *Do not enter a temporary address*." Armed Forces of the U.S., Form DD 1966 (emphasis added).

D. The Federal Uniformed and Overseas Citizens Absentee Voting Act and the Washington State Constitution

In Washington, the right to vote of these persons is constitutionally protected--one does not lose residence for voting purposes by absence in the civil or military service: "[N]o person shall be deemed to have . . . lost a residence by reason

[17] The Washington Constitution (Article VI, Section 4) provides that this home ("residence") is retained for voting purposes through the period of federal service. *Infra*, pp. 22-23.

of his absence, while in the civil or military service of the state or of the United States . . .." Wash. Const. art. VI, § 4; Wash. Rev. Code § 29.01.140 (1971).

In 1986, Congress enacted the Uniformed and Overseas Citizens Absentee Voting Act (Voting Act). 42 U.S.C. §§ 1973ff-1973ff-6. The Voting Act protects the right of overseas citizens, including both military and civilian, to vote in federal elections. It calls for absentee voting by postcard, with the normal state registration requirements waived. 42 U.S.C. §§ 1973ff-1973ff-1.[18]

Congress has specified a procedure for determining in what state the citizen may vote, which bears a striking similarity to that used by Census in determining where to count the citizen for apportionment purposes.

The definition of "absent uniformed services voter" specifically includes the requirement that the voter "is absent from the place of residence where the member is otherwise qualified to vote." 42 U.S.C. § 1973ff-6(1)(A). The absent uniformed services voter is allocated to vote in the place where he or she would otherwise be qualified to vote. As noted above, this conforms with Washington law.

The Census Bureau used an appropriate similar method for allocating overseas citizens to the states. The underlying general principle in locating individuals for census purposes is "usual place of residence." The task facing the Census Bureau in allocating overseas citizens to the various states is how to best implement that concept from the available data.

The Census Bureau reviewed various alternatives. The thoroughly reasonable conclusion drawn was that home of record, the last permanent residence before entering the military, is the best approximation of usual place of residence. *See generally*, Huckabee, CRS Study; J.A. at 872, 882. Home of record data is intended to reflect the self-identification of the individual at the last point in time at which his/her residence is

[18] Congress has reported that as of 1986, over six million voters took part in the predecessor to this program. H.R. Rep. No. 99-765, 99th Cong., 2d Sess. 8 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2009, 2012.

a matter of choice.

Not only is this concept of self identification basic to the census as a whole, but resembles the determination of Congress (and the states) with regard to voting.

Among the purposes of Congress in enacting the Voting Act was the policy that "U.S. citizens overseas may continue to vote for Federal office even if they have no current address in the United States." H.R. Rep. No. 99-765, 99th Cong., 2d Sess. 6-7 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2009, 2010-11. The lack of a current address in the United States therefore did not trouble Congress in the context of allowing overseas citizens to vote in the fifty states. As noted above, Washington similarly protects those rights. Wash. Const. art. VI, § 4; Wash. Rev. Code § 29.01.140 (1971). The court below, however, found it "arbitrary and capricious" to afford citizens the same rights when it came to determining their representation in Congress.

The home of record statistics used by the Census Bureau reflect the citizen's chosen state of residence prior to his location being determined by order of the Executive (Commander-in-Chief). For voting purposes, similarly, Congress allowed those overseas to vote in the last state in which they had voluntarily chosen to become qualified.

This similarity of choices supports the conclusion the decisions of the Secretary is not arbitrary or capricious. [19]

III. Refusing to Count Persons Serving the United States (Temporarily) Overseas Violates the Constitutional Rights of Those Citizens and Their States

A. Those Serving Their Country Have a Right to Be Counted

The court's order violates constitutional rights of those U.S. citizens under the equal protection component of the Fifth

[19] It has been previously noted that Congress' record expressions of opinion on the "overseas count" and "home of record" issues were in favor of both (*e.g.*, H.R. 4903, passed House June 26, 1990).

Amendment. The court ordered the Census Bureau to treat residents of the United States abroad on one day, April 1, 1990, differently than those located within the United States, for purposes of determining congressional representation. The remedy is draconian; treat them as nullities for apportionment purposes. The effect lasts ten years.

The court's conclusion is based on the belief that there is no reasonably accurate method for connecting persons temporarily overseas to their state. However, it has already been shown that a reasonable method exists for determining the state of overseas military and federal employees and their dependents and that this home of record is comparable to the federal and state determination of voting place. *Infra*, pp. 17-19. Any census procedure that excludes persons who can be enumerated discriminates on its face because those excluded are thus denied representation in the House of Representatives, as provided by Article I, Section 2 of the Constitution.[20]

The equal protection component of the Fifth Amendment prohibits the federal government from denying equal protection of the laws. *See Bolling v. Sharpe*, 347 U.S. 497 (1954). Census procedures are implemented by the Census Bureau under the authority delegated it by Congress, which the court below conceded has plenary power over census procedures. J.S. App. 74a, *citing* U.S. Const. art. I, § 2, cl. 3.

The Fifth Amendment's equal protection guarantees therefore apply to discriminatory census procedures. Analysis of equal protection under the Fifth Amendment is the same as under the Fourteenth Amendment. *Buckley v. Valeo*, 424 U.S. 1, 93 (1976).

The equal protection component of the Fifth Amendment is intended to prohibit intentional discrimination by the federal government. *Washington v. Davis*, 426 U.S. 229, 239 (1945).

The facially discriminatory practice at issue in this case is distinguishable from the effect of undercounting at issue in *Tucker v. United States Department of Commerce*, No. 91-2051

[20] The *effect* here of discrimination is to diminish the congressional representation not only of the excluded overseas military, but of their state and its other citizens.

(7th Cir. Mar. 16, 1992). The *Tucker* court held that the undercount claim reflected only an "unintended consequence of measures adopted for reasons unrelated to any intention to discriminate." *Tucker*, slip. op. at 5. Disparate impact alone is not a sufficient basis for a finding of unconstitutional discrimination. *Tucker*, slip. op. at 5 (citing *Washington*, 426 U.S. at 239-45).

Here, however, the measures are intended to treat one group differently from all other persons enumerated by excluding them from apportionment. This exclusion deprives that one group--overseas federal employees and their dependents--of their constitutional right to fair representation in Congress.

Disfranchisement from representation may not be accomplished short of constitutional amendment. Women, children, prisoners, and even aliens have always been counted for purposes of apportionment, even while not entitled to vote. *See* Note, *Constitutional Issues of the Federal Census*, 94 Harv. L. Rev. 841, 847-8 (1981). The original language of Article I, Section 2 excluded from representation only "Indians not taxed" and, by implication, two-fifths of all persons who were slaves. Since adoption of the Fourteenth Amendment following the Civil War, only "Indians not taxed" have been excluded. All other persons are counted and allocated to the states for apportionment purposes. Even illegal aliens are counted and represented. *Federation for American Immigration Reform* (FAIR) *v. Klutznick*, 486 F. Supp. 564 (D.D.C. 1980), *appeal dismissed* 447 U.S. 916 (1980). To treat those overseas on one day differently, when they are capable of being adequately enumerated and counted back to the states, infringes on both a state's right to equal representation based on population, and on each individual's right to fair representation in Congress. It is a particularly egregious violation where the overseas status, and duration, is *ordered* by the United States (the President, as Commander-in-Chief).

Statutes that dilute the effectiveness of some citizens' votes have been held subject to strict scrutiny under an equal protection analysis. *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 626 (1969); *Reynolds v. Sims*, 377 U.S. 533, 561 (1964). No less rigid standard applies here. Fair representation is

guaranteed to the states and their citizens by the Constitution; thus any infringement on that representation must withstand strict scrutiny. *See Buckley*, 424 U.S. at 94.

Such infringement is constitutional only if it is necessary to promote a compelling governmental interest. *Kramer*, 395 U.S. at 627. While there may be no viable method for finding, counting and allocating to the states all United States citizens traveling abroad on census day, those who are in the military or employees of the federal government, as well as their dependents, can be counted adequately.[21] Those who can be counted, must be counted.

Massachusetts bears the burden of showing that the practice of not counting federal and military employees and their dependents is necessary to achieve a compelling governmental interest.

Moreover, each individual deprived of representation under Massachusetts' scheme has a right to full representation in Congress through their home states. "'[T]he uniform of our county . . . [must not] be the badge of disfranchisement for the man or woman who wears it.'" *Carrington v. Rash*, 380 U.S. 89, 97 (1965) (quoting Governor Arnall's message to the Georgia General Assembly, January 3, 1944). The same may be said of those serving their government as civilians and of dependents.

B. The Constitution Guarantees the States' Representation of all Their Citizens in Congress

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[21] The data relied upon in 1990 is not arbitrary and capricious, nor inherently unreliable as noted above. *Infra*, pp. 17-19, There has never been a perfect census count, *Carey v. Klutznick*, 653 F.2d 732, 735 (1981), and perfection is not required. Here, the agency did not merely repeat its 1970 exercise for obtaining the overseas enumeration, but rather, acted to identify and correct deficiencies in the data available to them, "achiev[ing] the most accurate population count possible in view of the Census Bureau's resources, and the inherent difficulties of the task." *Cuomo v. Baldridge*, 674 F. Supp. 1089, 1093-94 (S.D.N.Y. (1987).

The right to equal representation in Congress, based on population ("persons"), is guaranteed to the states by the Constitution.

Use of the word "persons" in Article 1, Section 2, Clause 3 was vigorously debated during the Constitutional Convention of 1787. Some members sought to limit the apportionment counts to voters, citizens, or landholders. The broader term "persons," which included those not considered part of the body politic, such as women, children, and prisoners. Proponents of the broad term "persons" prevailed. *See* 1 Farrand, *The Records of the Federal Convention of 1787*, 35 ("inhabitants"), 486, 580 (1911); *Pour's Federal and State Constitution* (1878). Following the Civil War, the three-fifths clause was removed by the Fourteenth Amendment. U.S. Const. amend. XIV, § 2. The issue of whom to count was again the subject of considerable, and similar, debate. *See Cong. Globe*, 39th Cong., 1st Sess. (1866). Once again, however, the drafters based representation of the states upon overall population of each state, rather than on a narrower basis, such as number of landholders or voters. *Cong. Globe*, 39th Cong., 1st Sess. (1866); *see also* Zuckerman, *A Consideration of the History and Present Status of Section 2 of the Fourteenth Amendment*, 30 Fordham L. Rev. 93 (1961).

The history of Article I, Section 2 demonstrates that nothing is more fundamental to our form of government than this principle of equal representation. The Court should give substantial weight to the legislative history of constitution provisions. *See Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) ("it is in the light of [its] history that we must construe Art. I, § 2 of the Constitution . . . .").

An individual's right to fair representation in Congress is both distinct from, and broader than, the right to vote. Both Congress and the courts have recognized that the "non-voting classes" have a vital interest in the conduct of government. *FAIR*, 486 F. Supp. at 576; *Cong. Globe*, 39th Cong., 1st Sess. 141 (1866) (remarks of Rep. Blaine). That vital interest includes the right to be counted in a state's population for congressional apportionment purposes. *FAIR*, 486 F. Supp. at 576-77 (holding the constitutional requirement of counting "whole number of persons" for apportionment purposes includes illegal aliens).

Under the express language of both Article 1, Section 2, Clause 3 and the Fourteenth Amendment, it has been held that the Census Bureau is required to count all persons and apportion them to the states. *Young v. Klutznick*, 497 F. Supp. 1318, 1332 (E.D. Mich. 1980), *rev'd on other grounds by* 652 F.2d 617 (1981).

Early census procedures reflected the practice of enumerating persons temporarily away from their usual residence. The first census, conducted in 1790, required marshals to "cause the number of inhabitants within their respective districts to be taken." 1 Stat. 101 (1790) ("An Act providing for the enumerations of the Inhabitants of the United States.") The count included as inhabitants "every person occasionally absent at the time of the enumeration, as belonging to that place in which he usually resides in the United States." 1 Stat. 103 (1790). The 1790 census implemented the Framers' understanding that apportionment was to be based on total population.

Madison had stated in 1787, in discussing qualifications for House membership, "both ['resident' and 'inhabitant'] were vague, but the latter least so in common acceptance, and would not exclude persons *absent occasionally for a considerable time on public or private business*." 2 Farrand at 217 (emphasis added).

The constitutional requirement is that all persons be counted in the census for purposes of apportionment. *FAIR*, 486 F. Supp. at 576. Children, prisoners, the mentally incompetent and aliens (including illegal aliens) are counted for purposes of apportionment, even though not entitled to vote. *FAIR*, 486 F. Supp. at 576; *see also* Note, *Constitutional Issues of the Federal Census*, 94 Harv. L. Rev. 841, 847-48, (1981).

To treat those serving abroad as less deserving of representation than convicts or illegal aliens, when they are capable of being adequately enumerated and counted back to the states, infringes on both a state's right to equal representation based on population, as well as those individuals' right to fair representation in Congress.

Massachusetts argues that because these citizens were excluded in 1980, they should be excluded again. However, this

Court has never been persuaded to deny equal protection for reasons "based on exigencies of history or convenience." *New York City Bd. of Estimate v. Morris*, 489 U.S. 688, 703 n.10 (1989); *Reynolds*, 377 U.S. at 579-80. Enumeration methodologies have so far improved in the last decade as to obviate any argument that the practice is historically unsound. The Census Bureau is readily capable of allocating overseas federal and military personnel and dependents to the states for apportionment purposes. Both Article I, Section 2 and the Fifth Amendment's equal protection guarantees require no less.

CONCLUSION

The judgment of the district court should be reversed, the finality of the 1990 Census and Apportionment be confirmed, and judgment be entered affirming the decision of the Secretary to count those serving the country overseas.

Respectfully submitted,

KENNETH O. EIKENBERRY
Attorney General
JAMES M. JOHNSON*
Sr. Assistant Attorney General
J. LAWRENCE CONIFF
JEFFREY T. EVEN
CAROLE A. RESSLER
Attorneys
Attorneys for Amicus Washington
*Counsel of Record

Certificate of Entitlement

HOUSE OF REPRESENTATIVES

OFFICE OF THE CLERK
WASHINGTON, D.C.

I, Donnald K. Anderson, Clerk of the House of Representatives of the United States, Hereby Certify, Pursuant to the Provisions of Title 2, United States Code, Section 2a (b), That the State of

WASHINGTON

Shall be Entitled, in the One Hundred Third Congress and in Each Congress Thereafter Until a Subsequent Reapportionment Shall Take Effect Under Applicable Statute, to

NINE REPRESENTATIVES

in the House of Representatives of the Congress of the United States.

In Witness Whereof I Hereto Affix My Name and the Seal of the House of Representatives of the United States of America this Sixteenth Day of January, Anno Domini 1991, in the City of Washington, District of Columbia

Donnald K. Anderson.

Clerk of the House of Representatives of the United States

APPENDIX A

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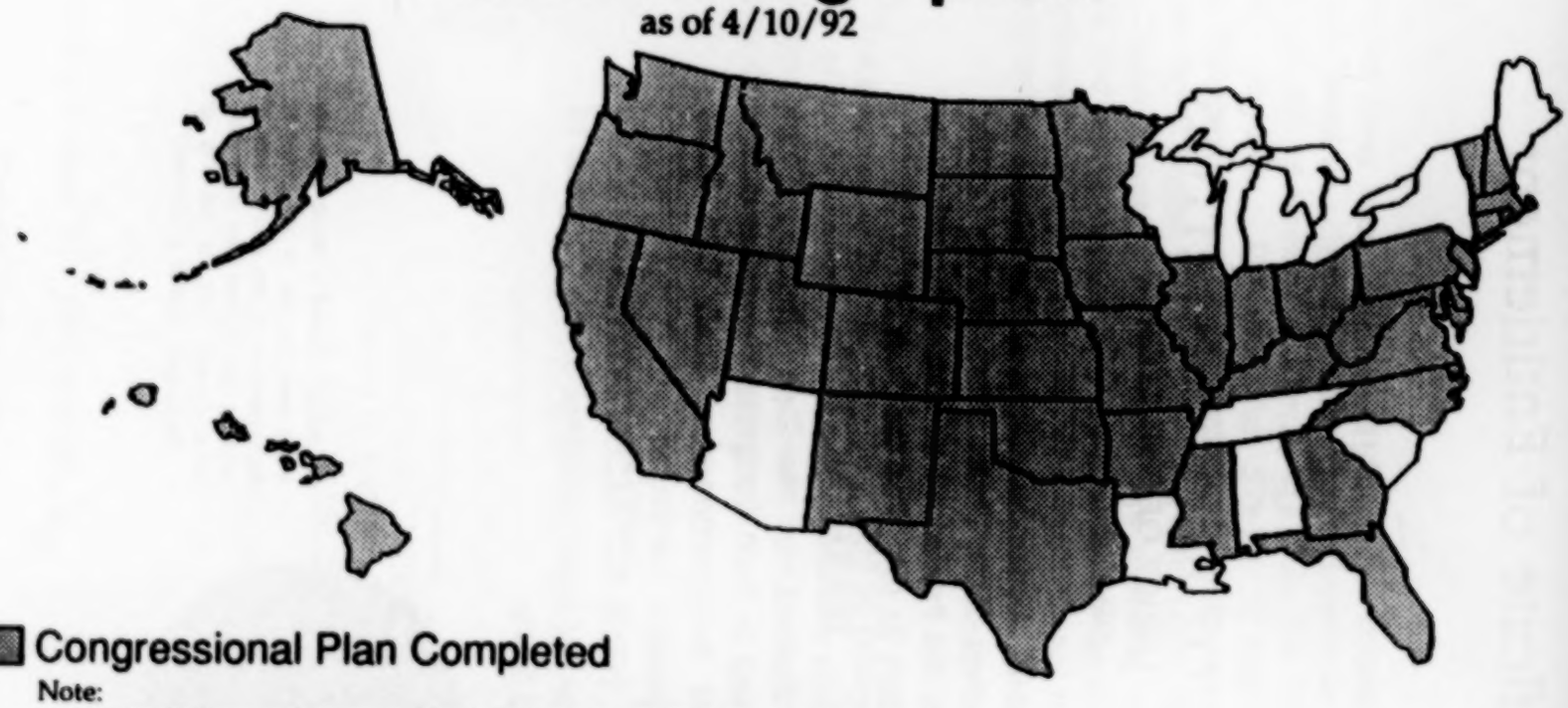
APPENDIX B

Redistricting Update

as of 4/10/92



Congressional Plan Completed

Note:

- Alaska, Delaware, Montana, North Dakota, South Dakota, Vermont and Wyoming have only one congressional seat and are not required to redistrict.

Source: National Conference of State Legislatures (updated)

MAR 27 PAGE 14

Supreme Court, U.S.
FILED
MAR 17 1992
OFFICE OF THE CLERK

91-1502 (9)

NO.

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1991

BARBARA HACKMAN FRANKLIN, et al.

Appellants,

v.

COMMONWEALTH OF MASSACHUSETTS, et al.

Appellee.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS

BRIEF OF THE STATE OF WASHINGTON AS AMICUS IN SUPPORT OF APPELLANTS UNITED STATES' MOTION FOR STAY

KENNETH O. EIKENBERRY
Attorney General
JAMES M. JOHNSON*
Sr. Assistant Attorney General
JEFFREY T. EVEN
Assistant Attorney General

Attorneys for Amicus
*Counsel of Record

Highways-Licenses Bldg.
Seventh Floor
P.O. Box 40100
Olympia WA 98504-0100
(206) 753-4556

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BRIEF OF STATE OF WASHINGTON AS AMICUS CURIAE

Pursuant to United States Supreme Court Rules 37.2 and 37.5, the State of Washington files this brief of amicus curiae to support the Motion for Stay filed by the United States appellants.

The orders below meet the criteria for stay set forth by this Court (Republican State Cent. Com. of Arizona v. Ripon Soc., Inc., 409 U.S. 1222 (1972)). A stay pending appeal is justified because of the irreparable injury to Washington and its citizens and elections system. In this context "Washington citizens" include all those deprived of United States House representation (if one seat is lost or threatened) and especially those who were serving the country overseas on census day (April 1, 1990) who would be excluded from representation under orders of the court below. The following brief, taken with the brief of Appellants, indicates the probability the district court was in error. Finally, the public interests in assuring finality and confidence in the census/apportionment and related political system argues in favor of stay.

This case is unlike the situation in Campos v. City of Houston, 112 S. Ct. 354 (October 29, 1991). It is Massachusetts which solely bears the responsibility for delay in this action - having waited over one and one-half years after Commerce decision on counting the temporarily overseas to bring this action (and having waited over 5 months after receiving the Certificate of

Entitlement to United States House Seats. The effect of the lower court order is to disrupt the orderly and lawful conduct of Washington's elections and redistricting processes. A stay will cure these problems.

INTERESTS OF AMICUS WASHINGTON

The State of Washington's population grew faster than the national average during the decade 1980-90 (and considerably faster than Massachusetts). Thus, when the results of the 1990 census and the apportionments of United States House seats to the states were certified by the President and Certificates of Entitlement issued by the Clerk of the House of Representatives, Washington received an increase of 1 to 9 U.S. Representatives.[1]

Because Washington's ninth seat was the last allocated under the 1990 apportionment (number 435), several of the legal challenges filed by states losing seats[2] have sought a seat certificate to Washington--though that state has never been sued directly.

In this action, a three-judge United States District Court for the District of Massachusetts issued an order requiring the

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[1] Massachusetts' certificate showed a decrease of 1 to 10 seats, reflecting its relative population decline.

[2] The last considered by this Court was United States Dep't of Commerce v. Montana, U.S. Supreme Court cause number 91-860 (Argument, March 6, 1992).

results of the census be recomputed to exclude all U.S. government employees (including military) that records indicate were temporarily overseas on April 1, 1990.[3] The Executive (President) is ordered to submit a new statement showing the number of representatives to which each state would be entitled if these counts are excluded from congressional apportionment. The parties below, which did not include Washington, had stipulated that absent the inclusion of those federal employees, Washington would be entitled to only eight representatives. While Washington does not concede this is true, it is the potential loss of one of its U.S. House seats that prompts participation here.[4]

The district court ordered the Clerk of the United States House of Representatives to "send the executive of each state a recertification of the number of representatives to which such statute is entitled in accordance with paragraph 3 of this order." Final Decrees and Orders of the District Court, slip op.

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[3] Some of these persons and units were undoubtedly in the United States, and/or in transit on April 1, 1990. Surely they, and Washington, are entitled to a trial to show that blanket exclusion is not appropriate where, as here, it denies them political representation.

[4] First, the numbers come from records Massachusetts alleges and the court held are unreliable. Also, this stipulation must assume no other changes to census or apportionment. An "adjustment" as sought in New York v. Commerce, 713 F. Supp. 48 (1989) or a different apportionment methodology such as the "Webster method" urged by Massachusetts below, would leave Washington's nine seats unchanged.

at 2. The court ordered this to occur on or before April 10, 1992. It is presumed the defendants would act in accordance with their stipulation, and attempt to take a seat from Washington. This relief ordering Congress or the Clerk to issue new Certificates of Entitlement, was not requested in Massachusetts' complaint.

The court did not consider whether the Clerk has authority to change Certificates of Entitlement (and cited no such authority) and overruled Washington's objection that it was an indispensable party. The court also failed to consider the rights of those citizens who would be deprived of representation under its decision.

By this brief, Washington supports the Motion for Stay of the United States and urges that this Court stay the order of the court below pending a decision on the merits. The following briefly outlines the severe detrimental effects of the order, and legal analysis of why it is unlikely to be upheld on appeal. In order to avoid duplicating the U.S. arguments, we attempt to concentrate on legal arguments especially available to Washington and its overseas-serving citizens who are deprived of representation under the lower court's decision.

SEVERE DETRIMENTAL EFFECTS IF THE COURT ORDER IS NOT STAYED

Disruptive Effect in Washington

Absent a stay, the district court's order leaves a cloud over the representatives to which Washington is entitled under

both the Statement of the President and the Certificate of Entitlement issued by the Clerk (pursuant to 2 U.S.C. § 2a and 2b).

Washington's problems, especially the disruption of its elections process described below, are aggravated by the fact there are now two federal court judgments challenging, in different ways, its ninth district representative.[5] Obviously, both cannot be correct; Washington can not lose 2 seats. When may Washington and its citizens rely on the finality of this process?

Washington redistricting is final (as required by Washington Constitution) and its redistricting commission is no longer in operation. Even the Washington Legislature, which theoretically may change the redistricting plan, (Wash. Rev. Code § 44.05.100 (1989)) is no longer in session.[6]

Preparations for the 1992 Congressional elections are already in progress, both by the State and by the various candidates. Candidates have declared and filed public disclosure and financial reporting statements.

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[5] It is assuming the conflict between the Montana court orders and the Massachusetts' court order will be addressed by the U.S. defendants.

[6] The Washington Constitution sets forth a sixty day session commencing in January for even-numbered years (Wash. Const. art. II, § 12)).

The number of U.S. House seats also affects directly the number of presidential electors. Delegates states send to each major national party's convention and are selected in part based on congressional districts. Each party's local caucuses for selection of convention delegates were held March 3, 1992 in Washington.

Given the need for redistricting and the continued uncertainty, the Massachusetts court order would have the probable effect of making it impossible for Washington to conduct its election in accordance with its laws.

Effect on Unrepresented Voters
Massachusetts' Court's Theory of "One Man No Vote"
(If Serving Overseas)

More importantly, the court's order should be stayed because it has the effect of denying United States House representation to United States citizens who happen to be serving their country in an overseas location--often at the order of the Executive--on the day of the census.[7]

Washington represents its citizens so situated and indeed those of all states since neither the U.S. nor Massachusetts addressed below the rights of those absent citizens. The court

[7] With the inclusion decision of Commerce, the records did not have to be sufficiently accurate to show the precise locations of units and persons on one day, April 1, 1990. However, if the court order works an exclusion, and deprives citizens of representation because they are absent on that one day, the records must be subjected to trial or other due process scrutiny to assure that only those actually absent are affected.

herein disregarded the rights of all such citizens in its rush to add back a Massachusetts seat. It will be demonstrated further below that denying representation under such circumstances is unconstitutional as a violation of the equal protection concepts of the Fifth Amendment.

The Decision Disrupts the Finality of the
Census/Apportionment Process

The court's order should be stayed to achieve finality in the apportionment process. All states have an interest in finality of the census/apportionment process. The changing of figures ordered by the district court will affect not only the Washington U.S. House seat, but presumably leaves the way open to additional Administrative Procedure Act challenges to methodological decisions made by Census/Commerce. The litigation over "adjustment" is only one example.[8] It is extremely burdensome and disruptive to redistrict a second time after the difficult battles inherent in redistricting have been fought. Redistricting often brings to a halt the business of legislatures in states where redistricting is a legislative function.

This interest in finality was only overridden in Massachusetts by its desire to slow the inevitable loss of Congressional representation caused by its relative population decline. An extra House seat was worth it to the state. Overall, the interests to the body politic of assuring finality

[8] Other litigation demanding adjustment of the Census figures was, and is, pending in district court, e.g., New York v. Commerce, 713 F. Supp. 48 (1989) (preliminary rulings reported).

predominate. Statutorily, this finality is found in the explicit deadlines in 2 U.S.C. § 2a and 2b (December 26, 1990 for the Census; January 3, 1991 for the President's Statement of state representation; January 16, 1991 for House Certificates of Entitlement).

BACKGROUND AND PROCEEDING BELOW

The census of the United States was conducted as of April 1, 1990. 13 U.S.C. § 141(a). Nearly nine months before, however, all states had been advised of the final decision of Secretary of Commerce Mosbacher, that overseas federal employees would be counted in the 1990 census (Decision of the Secretary, August 1, 1989).

Far from complaining or moving to legally challenge this decision, there is no indication representatives of Massachusetts had opposed such an approach. For example, the U.S. House on June 26, 1990, passed on consent HR 4195 to prohibit exclusion of military personnel stationed outside the United States and to direct "home of record" be used. There was no recorded dissent from Massachusetts' representatives.

Given the overwhelming representatives' support for that measure, it seems likely that such a bill would have passed, were it not for the decision of the Secretary of Commerce to exercise his discretion as delegated by Congress, and order the counting of the (temporarily) overseas citizens and the later determination to utilize the "home of record" as provided in the bill(s).

On December 26, 1990, the census results including overseas federal employees were reported to the President as required by the statute. On January 3, 1991 (the first day of the 102nd Congress), the President transmitted to Congress a report showing the results of the 1990 Census, and the number of representatives to which each state was entitled.

On January 16, 1991, the Clerk of the United States House of Representatives transmitted to each state a Certificate of Entitlement to that number of representatives required by 2 U.S.C. 29(b). Massachusetts is entitled to ten, and Washington to nine under their respective certificates.

Nearly two years after the decision to include the temporarily overseas and five months after receiving its Certificate, the Commonwealth of Massachusetts filed this action on May 12, 1991. Washington moved to participate as an amicus, specifically noting its refusal to waive sovereign immunity to be sued and that it was an indispensable party in any suit to take a Washington House seat.[9]

The Washington Redistricting Process is Final

The Certificate of Entitlement to nine United States House seats was duly received by Washington's Governor, and transmitted

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[9] Washington also noted the probable unconstitutionality of denying representation of citizens whom the United States had ordered temporarily out of country on the census day, describing the Massachusetts theory as "one man no vote."

to the Washington Redistricting Commission established by Washington Constitution, article 2, section 43, amendment 74.

The Commission redistricted Washington into the nine United States House districts (and intertwined state legislative districts). The redistricting plan was completed and filed on January 1, 1992. It is now final. Wash. Rev. Code § 44.05.100 (1989). The Washington Legislature, like the redistricting commission, is now out of session.

The district court ordered Massachusetts to complete its redistricting by March 30, 1992, based on eleven House seats.[10] The court gave no consideration to the burden upon Washington, which had already completed redistricting. Consideration of such disruptive effects and public consequence is required, before extraordinary relief is ordered. Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982).

Washington's elections system, including its participation in the nominating process for U.S. President, has proceeded in the interim. The caucuses of the major political parties were held on March 3, 1992. These are the first level of selection of delegates to the national conventions. Indeed, some delegates have already been chosen and the number is determined, among other factors by the number of presidential electors, and the districts (in part) from congressional districts.

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[10] Massachusetts made no effort to redistrict to 11 seats until ordered to do so by the lower court.

Washington has proceeded in good faith following the Statement by the President and issuance of the Certificate of Entitlement by the Clerk of the U.S. House both confirming entitlement to nine congressional seats (and districts).

A stay of the district court's order is imperative to avoid disruption of Washington's process pending a decision of this Court on the merits.

ARGUMENT

I. THIS COURT SHOULD GRANT A STAY OF THE DISTRICT COURT'S ORDER THAT CERTIFICATES OF ENTITLEMENT BE REISSUED, PENDING A RULING OF THIS COURT ON THE MERITS

The district court ordered that the Clerk of the House of Representatives, having already issued final Certificates of Entitlement to the various states, must now issue a new set, altering the numbers of Representatives for at least some states. This order would cause a serious hardship on states, such as Washington, who have already completed redistricting based on the Certificates. Preparations for the 1992 congressional elections are already underway, both by Washington and by the various candidates. Reissuance of the Certificates at this time, particularly pending a ruling on the merits by this Court, would duly disrupt the political process.

A. Reissuance of the Certificates Following Completion of Washington's Redistricting Would Seriously Prejudice Washington, Its Congressional Candidates, and Its Citizens

Washington has completed its congressional redistricting, in good faith reliance upon the Certificate of Entitlement

previously issued by the Clerk. There is no way Washington could lawfully have proceeded otherwise. Redistricting takes time, and may be a subject of considerable controversy. Election deadlines limit the time available. Schedules and deadlines are established by both the Washington Constitution and statutes.

Redistricting in Washington is governed by article II, § 43 of the Washington Constitution. In January of each year ending in one, the state's redistricting commission is convened to redraw all state legislative and congressional districts. Wash. Const. art. II, § 43(1). No legislative or congressional districts may be changed or established except under the auspices of that commission at that time. Wash. Const. art. II, § 43(11).

The commission must complete its redistricting as soon as possible, but not later than January 1 of each year ending in two. Wash. Const. art. II, § 43(6). Washington, therefore, could have done nothing to prevent the prejudice created by the order of district court. Regardless of pending litigation, the commission was constitutionally compelled to redistrict.

The Legislature may amend the plan before the thirtieth day of the first session convened after the plan is submitted, a date which has already elapsed. Wash. Const. art. II, § 43(7). Washington's redistricting is final and complete.

Time limits also significantly affect candidates for office, who require a reliable time line on which to operate and reliable district lines in which to run. In order to appear on the primary ballot, a candidate must file a declaration of candidacy

in July. Wash. Rev. Code § 29.18.025 (1989). However, activities by the candidates in reliance on specific districts begin far in advance of that date. Washington's Public Disclosure Commission has already received Statements of Candidacy of those running for Congress. Many of those candidates have already expended significant amounts of money, in reliance upon an expectation that they would be running in a district encompassing a certain geographic area.

If the district court's order is allowed to remain in effect, Washington's ninth district is threatened, even though this Court has not yet had an opportunity to address the merits of this case. Candidates and potential candidates have made their decisions to run or not to run based upon a settled expectation, which the court below would upset in its rush to award a seat to Massachusetts.

B. The Clerk Does Not Have Authority to Revoke Washington's Certificate of Entitlement[11]

The Clerk lacks the statutory or other authority to revoke or modify the Certificate of Entitlement of Washington or other states.

The applicable statute, 2 U.S.C. § 2a(b), provides that the Clerk shall issue a Certificate within 15 days after receiving

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[11] A related issue--that the Clerk has been enjoined by the lower court in United States Dep't of Commerce v. Montana, United States Supreme Court cause number 91-860 (Argument, March 6, 1992) from "effecting apportionment" under these statutes--will be addressed by the United States.

apportionment figures from the President. It does not provide, explicitly or otherwise, for the revocation or modification of a Certificate once it has been issued.

The word "shall" in statutory parlance is mandatory language. Board of Pardons v. Allen, 482 U.S. 369, 374 (1987); Bergen v. Spaulding, 881 F.2d 719, 721 (9th Cir. 1989).

The statute even goes on to specify who "shall" perform this duty if the Clerk does not:

> In case of a vacancy in the office of Clerk, or of his absence or inability to discharge this duty, then such duty shall devolve upon the Sergeant at Arms of the House of Representatives; and in case of vacancies in the offices of both the Clerk and the Sergeant at Arms, or the absence or inability of both to act, such duty shall devolve upon the Doorkeeper of the House of Representatives.

2 U.S.C. § 2a(b).

This Court has held the interpretation of a statute must begin with the statute's language. If the statutory language is unambiguous, in the absence of a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive. United States v. Turkette, 452 U.S. 576, 580 (1981). A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning. Perrin v. United States, 444 U.S. 37, 42 (1979).

The plain language of 2 U.S.C. §§ 2a and 2b indicate that the Clerk must issue Certificates in accordance with the President's Statement and has no authority to revoke or modify an issued Certificate. The legislative history of the statute, as

discussed below, confirms that the Clerk cannot, without explicit statutory authority, revoke or modify the Certificate.

Each state is entitled to the number of seats shown in the President's Statement and indicated in its respective Certificate until the taking effect of a subsequent reapportionment. 2 U.S.C. §§ 2a and 2b. To interpret the statutes to allow the Certificate to be changed would render this entitlement language meaningless. It is in the nature of a vested right, upon which the states are entitled to rely in redrawing their Congressional districts. It is an elementary canon of construction that a statute should be interpreted so as not to render one part inoperative. Mountain States Tel. & Tel. v. Pueblo of Santa Ana, 472 U.S. 237, 249 (1985). In construing a statute, a court is obliged to give effect, if possible, to every word Congress used. Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979).

The vesting of each state's entitlement probably occurs at the time the President's Statement is filed with the Congress; surely it vests when the Certificate is actually issued and received.

Thus, pursuant to 2 U.S.C. §§ 2a and 2b, once the President and Clerk acted, Washington was entitled to nine congressional seats until the next census and apportionment (in the year 2000). At the very least, this entitlement should not be upset pending a definitive ruling of this Court on the merits. The Clerk has no authority to revoke or modify a Certificate after it has been issued, or to issue any Certificate varying from the Statement of

the President. The Clerk may not be ordered to perform an act he has no authority to perform.

C. Legislative History Confirms That the Certificates of Entitlement are Irrevocable (Absent Congressional Action)

The legislative history of 2 U.S.C. §§ 2a and 2b confirms that Washington's entitlement is irrevocable, short of explicit direction by an act of Congress. There is only one historical instance in which a state was denied a seat to which it was entitled according to a Certificate. An explicit act of Congress was required to take away the seat.

In 1941, Congress debated amendments to 2 U.S.C. § 2. As required by the statute, as then written, the President had reported the 1940 census results to the Congress in the first week of 1941. At that time, the statute provided that the method of apportionment used in the previous census should continue to apply unless Congress ordered otherwise within sixty days.

The Senate did not act within sixty days. 87 Cong. Rec. 8053 (1941) (Statement of Senator Vandenberg). In commenting on the effect if Congress did not specifically order a change, Senator Vandenberg stated:

> When the Senate did not act within 60 days, the statute made reapportionment by so-called major fractions final and conclusive and binding upon all concerned. The case was closed; the incident was finished; and the Clerk of the House so notified the States.

Id.

To change that situation, it was recognized that a specific act was required. Such a retroactive change was bitterly

opposed. The debate confirmed the general proposition of our argument here: unless Congress specifically acts, the Certificates are final.

Despite this debate concerning the equities (87 Cong. Rec. 8078-83 (1941)), Congress voted to make the change in method retroactive and require new Certificates to be issued. Section 2b of the Act of November 15, 1941 provided as follows:

> (b) If before the enactment of this Act a certificate has been sent to the executive of any State under the provisions of such section 22, as in force before the enactment of this Act, the Clerk of the House of Representatives shall, within fifteen calendar days after the date of enactment of this Act, send a new certificate to such executive stating the number of Representatives to which State is entitled under this section.
>
> Approved November 15, 1941.

Pub. L. No. 87-291, 55 Stat. 761, 762 (1941) (originally codified as 2 U.S.C. § 2b).

The Clerk was to send a new Certificate of Entitlement if such a Certificate had been sent prior to November 15, 1941 (as they had). Thus, the new determinations were made, and the new Certificates issued (changing only Michigan and Arkansas).

This is the one occasion Congress was confronted with valid Certificates that it wished to change.

Congress' action in 1941, and the legislative history surrounding it, confirms that a Certificate of Entitlement cannot be revoked or modified by the Clerk unless and until Congress

enacts legislation to that effect. A court may not order the Clerk to perform beyond his statutory authority.[12]

D. **There Should Be Finality in Congressional Apportionment**

There should be finality in congressional apportionment because it would be harmful and disruptive to permit endless changes to political authority. Both federal and state courts recognize that there should be finality in political processes, especially procedures relating to elections. Morgan v. United States, 801 F.2d 445, 450 (D.C. Cir. 1986), cert. denied, 480 U.S. 911 (1987) ("The pressing legislative demands of contemporary government have if anything increased the need for quick, decisive resolution of election controversies").

Apportionment of congressional seats relates directly to elections, since legislative districts are drawn based on the number of seats awarded to each state. Washington, like many other states, has already expended considerable effort redistricting. To take a seat from Washington now would be disruptive, requiring redistricting efforts to start again, and undermining public confidence in our political process. By the time such efforts could begin, the census figures would have to be updated or would be more out of date than is inevitable under

[12] The statutory source of the district court's jurisdiction to order Congress--or the President--to take the actions directed is not clear. It is unlikely Congress waived its legislative immunity from suit in the jurisdictional statute relied on below. 28 U.S.C. § 1331.

the present process. In the interest of preserving the integrity and finality of the apportionment process, the Clerk should not now be ordered to revoke or modify Washington's Certificate at this late date. These public consequences must surely be considered. By themselves, they justify a stay of the district court's order. Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982).

II. THE DECISION OF WHOM TO INCLUDE IN THE CENSUS IS ENTRUSTED BY CONGRESS TO COMMERCE; THE LOWER COURT'S INTERFERENCE REQUIRES STAY

A. The Secretary of Commerce Acted Within and In Accordance with Congress' delegation to Him of Census Authority

Congress vested broad discretion in the Secretary of Commerce as to the conduct of the census. 13 U.S.C. § 141. The Secretary acted within this discretion in deciding to include overseas federal employees, the count for apportionment purposes (a decision a predecessor had also made in 1970--with less accurate data to work from).

The court's conclusion in overturning the Secretary's decision and denying representation to those serving their country not only contradicts representational theory of a democratic society,[13] but the expressed intent of Congress as

[13] As a witness noted before a congressional committee considering the voting rights of overseas citizens:

> Our military community is subject to Federal and State taxes and, due to the nature of their profession, most have to leave their families, homes, and communities for extended

(Footnote continues on next page)

well. Congress has specifically provided for protection of the voting rights of overseas citizens, including overseas federal employees. 42 U.S.C. §§ 1973ff et seq. In so legislating, Congress has adopted a procedure similar to that followed by the Census Bureau in counting these same persons. The Census Bureau did not act arbitrarily in allowing voters to be counted and represented for apportionment purposes on a similar basis.

1. **The Workings of the Uniformed and Overseas Citizens Absentee Voting Act**

In 1986, Congress enacted the Uniformed and Overseas Citizens Absentee Voting Act (Voting Act). 42 U.S.C. § 1973ff et seq. The Voting Act provides a procedure for overseas citizens, including both military and civilian, to vote in federal

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(Footnote continued from previous page)
periods of time. However, absence from their State or community does not mean that they are not concerned about the policy decisions their elected representatives are making, or how their tax dollars are being spent.

Uniformed and Overseas Citizens Absentee Voting: Hearings on HR 4393 Before the Subcomm. on Elections of the Committee on House Administration, U.S. House of Representatives, 99th Cong., 2d Sess. 39 (1986) (testimony of C.R. Jackson, vice president for government affairs of the Non Commissioned Officer's Association of the United States of America).

As Representative Roberts noted, there has existed, "a very serious problem . . . overseas among the military and Federal civil service . . . of feeling disenfranchised, of being second class citizens, not having access to the system in which they really want to participate." Id. at 68. Massachusetts argues that despite Congressional action on voting, their votes should be emasculated by perpetuating that second class status when it comes to representation in Congress.

elections. It calls for absentee voting by postcard, with the normal state registration requirements waived. 42 U.S.C. § 1973ff.[14]

Congress has specified a procedure for determining in what state the citizen may vote which bears a striking similarity to that used by Census in determining where to count the citizen for apportionment purposes. This Congressional stamp of approval on a similar system supports the conclusion that the Secretary of Commerce acted reasonably in conducting the census.

In which state a voter is counted is determined by reference to the term "overseas voter", defined in 42 U.S.C. § 1973ff-6(5).

The definition of "absent uniformed services voter" specifically includes the requirement that the voter "is absent from the place of residence where the member is otherwise qualified to vote." 42 U.S.C. § 1973ff-6(1). The absent uniformed services voter therefore votes in the place where he or she would otherwise be qualified to vote,[15] while any other overseas voter votes in the state in which they were last domiciled.

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[14] Congress has reported that as of 1986, over six million voters took part in the predecessor to this program. H.R. Rep. No. 99-765, 99th Cong., 2d Sess. 8 (1986), reprinted in 1986 U.S.C.C.A.N. 2009, 2012.

[15] This Court has determined that military personnel have a right to establish residency on a military installation, and to register and vote in local, state, and national elections. Evans v. Cornman, 398 U.S. 419, 26 L. Ed. 2d 370, 90 S. Ct. 1752 (1970).

2. The Census Bureau Used an Appropriate Similar Method for Allocating Overseas Citizens to the States

The underlying general principle in locating individuals for census purposes is "usual place of residence." The task facing the Census Bureau in allocating overseas citizens to the various states is how to best implement that concept from the available data. The Census Bureau determined that the most accurate method was to start with data showing "home of record." The meaning of the term "home of record" is vital to determining the propriety of the Bureau's actions. The decision of the court below is based upon a misunderstanding of the term. The district court believed that the "home of record" data was subject to inaccuracy because the home of record could be a location chosen simply for tax reasons. Slip op. at 81. This is simply untrue. Home of record is not used by the Defense Department for the designation of the state to which an employee pays taxes, "legal residence" is used for taxes. See Joint Federal Travel Regulation, ch. 56, app. H, definition of "Home of Record", and Department of Defense Military Pay and Allowances Manual, § 70105, defining "legal residence," which is to be used for tax purposes.

The Census Bureau reviewed various alternatives and considered their relative merits as criteria for determining the state to which an individual should be apportioned. The thoroughly reasonable conclusion drawn was that home of record, the last permanent residence before entering the military, is the best approximation of usual place of residence. Home of record

data are intended to reflect the self-identification of the individual at the last point in time at which his/her residence is a matter of choice.

Not only is the concept of self-identification basic to the census as a whole, but resembles the determination of Congress (and the states) with regard to voting. Under the Voting Act, the overseas citizen is allowed to vote in the state in which he or she would otherwise be qualified. 42 U.S.C. § 1973ff-6. This too reflects the volitional acts of the voter.

Among the purposes of Congress in enacting the Voting Act was the policy that "U.S. citizens overseas may continue to vote for Federal office even if they have no current address in the United States." H.R. Rep. No. 99-765, 99th Cong., 2d Sess. 6-7 (1986), reprinted in 1986 U.S.C.C.A.N. 2009, 2010-11. The lack of a current address in the United States therefore did not trouble Congress in the context of allowing overseas citizens to vote in the fifty states. In fact, Congress expressly found that such voters should be allowed to vote. Id. The court below, however, found it "arbitrary and capricious" to afford citizens the same rights when it came to determining their representation in Congress.

Clearly, the Census Bureau considered similar factors to those considered by Congress. The home of record statistics used by the Census Bureau reflect the citizen's state of residence prior to his location being determined by order of the Executive (Commander-in-Chief). For voting purposes, similarly, Congress

chose to enable voters overseas to vote in the last state in which they had voluntarily chosen to become qualified.

Given this similarity of policy choices, it is difficult to discern anything arbitrary or capricious about the actions of the Census Bureau. It has been previously noted that Congress' record expressions of opinion on the "overseas count" and "home of record" issues were in favor of both (e.g. H.R. 4903, passed House June 26, 1990).

III. THE DISTRICT COURT'S ORDER DENYING CONGRESSIONAL REPRESENTATION TO PERSONS SERVING THE UNITED STATES (TEMPORARILY) OVERSEAS VIOLATES THOSE CITIZENS CONSTITUTIONAL RIGHTS AND SHOULD BE STAYED

The census procedures required by the court below would require Congress, acting through the Census Bureau, to violate constitutional rights of U.S. citizens under the equal protection component of the Fifth Amendment. Massachusetts asserts that the Census Bureau should treat residents of the United States working abroad on one day, April 1, 1990, differently than those located within the United States, for purposes of determining congressional representation, i.e., provide such citizens no representation. This conclusion is based on the belief that there is no reasonably accurate method for connecting persons temporarily overseas to their state. However, it has already been shown that a reasonable method exists for determining the state of overseas military and federal employees and their dependents. (Infra, pp. 22-23) Any census procedure that excludes persons who can be enumerated discriminates on its face

because those excluded are thus denied representation in the House of Representatives, as provided by article I, section 2 of the Constitution.

The equal protection component of the Fifth Amendment prohibits the federal government from denying equal protection of the laws. See Bolling v. Sharpe, 347 U.S. 497 (1954). Census procedures are implemented by the Census Bureau under the authority delegated it by Congress, which the court below conceded has plenary power over census procedures. Massachusetts v. Mosbacher, slip opinion at 78, citing U.S. Const. art. I, § 2, cl. 3.

The Fifth Amendment's equal protection guarantees therefore apply to discriminatory census procedures. Analysis of equal protection under the Fifth Amendment is the same as under the Fourteenth Amendment. Buckley v. Valeo, 424 U.S. 1, 93 (1976).

The language of article 1, section 2, clause 3 strongly indicates that disfranchisement from representation may not be accomplished short of constitutional amendment. Women, children, prisoners, and even aliens have always been counted for purposes of apportionment, even while not entitled to vote. See Note, Constitutional Issues of the Federal Census, 94 Harv. L.R. 841, 847-8, (1981). The original language of article I, section 2 excluded from representation "Indians not taxed" and, by implication, two-fifths of all persons who were slaves. Since adoption of the Fourteenth Amendment following the Civil War, only "Indians not taxed" have been excluded. All other persons

are counted and allocated to the states for apportionment purposes. To treat those overseas on one day differently, when they are capable of being adequately enumerated and counted back to the states, infringes on both a state's right to equal representation based on population, and on each individual's right to fair representation in Congress. It is a particularly egregious violation where the overseas status, and duration, is ordered by the United States (the President, as Commander-in-Chief).

A. **Standard of Scrutiny.**

State apportionment statutes that dilute the effectiveness of some citizens' votes have been held subject to strict scrutiny under an equal protection analysis. Kramer v. Union Free School Dist., 395 U.S. 621, 626 (1969); Reynolds v. Sims, 377 U.S. 533, 561 (1964). No less rigid standard applies here. Fair representation is guaranteed to the states and their citizens by the Constitution; thus any infringement on that representation must withstand strict scrutiny. See Buckley, 424 U.S. at 94.

Such infringement is constitutional only if it is necessary to promote a compelling governmental interest. Kramer, 395 U.S. 627 (1969). While there may be no viable method for finding, counting and allocating to the states all United States citizens traveling abroad on census day, those who are in the military or employees of the federal government, as well as their dependents,

can be counted adequately.[16] Those who can be counted, must be counted.

Massachusetts bears the burden of showing that the practice of not counting federal and military employees and their dependents is necessary to achieve a compelling governmental interest. Under equal protection analysis, once a fundamental interest is identified and heightened scrutiny is determined to apply, the burden shifts to the government to show that the compelling interest test is met. See Kramer, 395 U.S. at 628; Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 666-68 (1966). The burden here should fall on the proponent of the discriminatory classification, which in this case is the state of Massachusetts.

Moreover, the individuals deprived of representation under Massachusetts' scheme have a right to full representation in Congress through their home states. "'[T]he uniform of our country . . . [must not] be the badge of disfranchisement for the man or woman who wears it.'" Carrington v. Rash, 380 U.S. 89, 97 (1965) (quoting Governor Arnall's message to the Georgia General Assembly, January 3, 1944). The same may be said of those serving their government as civilians and of dependents.

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[16] The data relied upon in 1990 is not arbitrary and capricious, nor inherently unreliable as noted above. Infra, pp. 22-23.

B. **History is No Barrier.**

Historical practices are no barrier to requiring full compliance with equal protection guarantees. The Supreme Court has never been persuaded to deny equal protection for reasons "based on exigencies of history or convenience." New York City Board of Estimate v. Morris, 489 U.S. 688, 703 n.10 (1989); Reynolds, 377 U.S., 579-80. Furthermore, enumeration methodologies have so far improved in the last decade as to obviate any argument that the practice is historically unsound. The Census Bureau is readily capable of allocating overseas federal and military personnel and dependents to the states for apportionment purposes. Both article I, section 2 and the Fifth Amendment's equal protection guarantees require no less.

IV. THE ACTION SHOULD HAVE BEEN DISMISSED BECAUSE WASHINGTON IS AN INDISPENSABLE PARTY

The court should have held that Washington (or other affected states) was indispensable, could not be joined, and dismissed plaintiffs' complaint (Fed. R. Civ. P. 19).

Two separate inquiries should have been conducted. First, are there parties who should be joined, either because their own interests or the interests of the parties might be harmed by their absence? Such parties, referred to as "necessary parties," must be joined if feasible. Fed. R. Civ. P. 19(a).

Second, if a party determined to be necessary under Rule 19(a) cannot be joined, should the action in "equity and good conscience" be dismissed? If the court determines that the

action should be dismissed the absent party is labelled "indispensable." Fed. R. Civ. P. 19(b); Eldredge v. Carpenters 46, 662 F.2d 534, 537 (9th Cir. 1981), cert. denied, 487 U.S. 1210 (1988). The inquiry is a practical one and fact specific. Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 118-19 (1968).

Washington was a necessary party under Rule 19(a)(2) because Washington claims an interest in its congressional seat, and the disposition of this action in Massachusetts' favor may impair or impede Washington's ability to protect its seat. The failure to join Washington also runs a risk of "leav[ing] . . . persons already parties subject to a substantial risk of incurring . . . inconsistent obligations. . . ." Martin v. Wilks, 490 U.S. 754 (1989).[17]

Conflicting claims by beneficiaries to a common trust--House membership in this case--present a textbook example of a situation where one party may be severely prejudiced by a decision in the party's absence. See 3A Moore's Federal Practice, para. 19.08 at 19-165 (1984) ("Where the purpose of the suit is the disposition of a fund, a trust, or an estate to which there are several claimants, all of the claimants are generally

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[17] Washington has pending litigation to enjoin the Clerk from changing its certificate. Montana already has an inconsistent order.

indispensable.") (quoted in Wichita & Affiliated Tribes of Oklahoma v. Hodel, 788 F.2d 765, 774 (D.C. Cir. 1986)).

In Carey v. Klutznick, 653 F.2d 732 (2nd Cir. 1981), cert. denied sub nom., Carey v. Baldrige, 455 U.S. 999 (1982), the court considered whether other states must be joined in a census case in which New York sought adjustment of population figures.

> "House membership is a fund in which fifty States have an interest. No State's share can be increased without adversely affecting at least one other State. . . . The adversely affected States therefore fall within the category of parties who should be joined in the instant litigation if feasible."

Carey, 653 F.2d at 737.

Only if an adequate remedy can be awarded without the absent party, the suit may go forward. Idaho ex rel. Evans, 444 U.S. 380 (1980). Although the United States was held not indispensible in that case (as Washington argued), if either defendant state had been absent the case would have been dismissed for failure to join an indispensable party.

No shaping of relief or remedy is possible to lessen prejudice because the relief Massachusetts seeks is all or nothing--an award of an additional congressional seat, which must necessarily be taken from Washington or another state.[18]

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[18] The Court could presumably order expansion of the House. This would raise further separation of powers and jurisdictional problems which however seem not to trouble the lower court.

Since Washington was an indispensable party to this litigation and not joined, the court below should have dismissed the claims.

CONCLUSION

The injury caused by the orders below to Washington and its citizens and the detrimental impact on the public interest are substantial.

As argued above in the Brief and Jurisdictional Statement of the United States defendants, it is unlikely the decision will be upheld. Accordingly, a stay of the decision and orders pending appeal should be ordered.

Dated this 17th day of March, 1992.

KEN EIKENBERRY
Attorney General

JAMES M. JOHNSON*
Sr. Assistant Attorney General

JEFFREY T. EVEN
Assistant Attorney General

Attorneys for Amicus
**Counsel of Record*

Highways-Lic. Bldg.
Seventh Floor
P.O. Box 40100
Olympia WA 98504-0100
(206) 753-4556

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

REPLY MEMORANDUM OF AMICUS, STATE OF WASHINGTON TO APPELLEES' OPPOSITION TO APPLICATION FOR A STAY PENDING APPEAL

KENNETH O. EIKENBERRY
Attorney General
JAMES M. JOHNSON*
Sr. Assistant Attorney General
J. LAWRENCE CONIFF
CAROLE A. RESSLER
Assistant Attorneys General

Attorneys for Amicus
*Counsel of Record

Highways-Licenses Bldg.
Seventh Floor
P.O. Box 40100
Olympia WA 98504-0100
(206) 753-4556

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INTRODUCTION

As authorized by this Court's Order of March 20, 1992, the State of Washington submits this Reply Brief,[1] accompanied by three election officials' Affidavits which rebut Appellees' mischaracterization of Washington's electoral process and interest in retaining the status quo while this litigation is resolved. Washington and its citizens and candidates will suffer

[1] Massachusetts' forty-seven page Brief and Affidavits were not received by Washington until March 23, 1992.

irreparable harm if the stay is not granted. The Order below is intended to destroy Washington's Redistricting Plan for nine United States House districts. This Plan was finally completed through a Washington constitutional procedure using a Commission instead of the Legislature. Washington so proceeded, of course, in reliance upon the Clerk's issuance of a Certificate of Entitlement. Its candidates and citizens have also proceeded in reliance on the Certificate and the Plan it supports.

1. The Balance of Harm Strongly Favors Washington

Massachusetts' contention that the balance of harm strongly favors it is based upon an inaccurate statement of Washington's election laws.[2] (Appellee's Brief in Opposition, pp. 14-17.) A more complete description of Washington's election system and laws is set forth below, and in the attached Affidavit of Gary McIntosh, Director, Elections Division, Secretary of State of the State of Washington.

As noted, congressional district lines were drawn by Washington's Redistricting Commission. Affidavit of Jennifer Helget, Executive Director, Washington Redistricting Commission. Washington law requires precinct boundaries to coincide with congressional district boundaries. Wash. Rev. Code § 29.04.050 (1989). They were adjusted to do so. Redrawing of

[2] Massachusetts' Stafford Affidavit is allegedly based on conversation(s) with a Washington employee. Setting aside ethical and evidentiary problems, the information in that affidavit does not accurately summarize Washington's election law.

congressional district boundaries would now require that voting precinct boundaries be modified. Many state and local election district boundaries will thus require adjustment.

Under state law, precinct boundaries can only be changed by county legislative authorities, requiring eight to ten weeks notice and process. Affidavit of McIntosh, p. 3. Precinct boundaries may not be altered at all after the thirtieth day prior to the first day for candidates to file for the primary election. Wash. Rev. Code § 29.04.040 (1989). This means that the county ordinance establishing precinct boundaries may not be modified after June 27, 1992. Affidavit of McIntosh, pp. 2-3.

The claim that "Washington (which) has a short and unstructured primary process, would not suffer any irreparable harm even without a stay" (Appellee's Brief in Opposition, p. 14) is false. Massachusetts' description of Washington's primary election process is distorted by significant omissions. Washington law requires that candidates other than those from the two major political parties file by June 17, at least ten days prior to convening a convention for the purpose of candidate nomination. Wash. Rev. Code § 29.24.020 (1989). Independent and minor parties are a frequent, and welcome, part of Washington politics. Munro v. Socialist Workers, 479 U.S. 189 (1986).

Many candidates for Washington's nine congressional seats have already announced their decision to give up other elective positions presently held. Affidavit of McIntosh, pp. 3-5. The upward aspirational mobility of many candidates has been set in motion by these commitments to run for Congress as others move to

fill vacant elective offices. If the ninth seat is removed at this late date, reversing this domino effect is impossible because of state law filing deadlines and other practical problems.[3]

Massachusetts' Brief also totally ignores federal election law that requires financial reporting by any candidate for federal office who raises or spends more than $5,000. 2 U.S.C. § 434(2)(A)(iii); § 431(2)(A). Under 2 U.S.C. § 431(e)(1), candidates must designate a committee within fifteen days of becoming a "candidate" (when $5,000 is raised). The records of the Public Disclosure Commission reveal that as of March 3, 1992, Washington already has twenty-six declared, filed candidates, nineteen for House of Representatives' positions in all newly-created congressional districts. Affidavit of Paul Gillie. Those candidates for the House of Representatives had already expended nearly $600,000 on campaigning. Massachusetts' claim that there is no harm to Washington citizens and candidates is false.[4]

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[3] The political burdens faced by a candidate of re-declaring for his or her former elected position, and the consequent effect upon others vying for that position demonstrate the degree of their reliance upon the Clerk's issuance of Washington's Certificate of Entitlement over a year ago and the practical difficulty of adjustment at this late date. Affidavit of McIntosh, pp. 2-3.

[4] Massachusetts' claim of "Washington's relatively passivity" (Appellees Brief in Opposition at 13) in this case or the census litigation generally is consciously false. Washington has filed its own litigation to defend the finality of its Certificate of Entitlement. Washington v. United States Dep't of Commerce, No. 91-315 (D. Wash. filed Mar. 7, 1991). Washington

(Footnote continues on next page)

The required election filings have been made in reliance upon the finality of this redistricting by candidates who have already spent substantial sums and otherwise commenced campaigns for election as a United States Representative in each of the nine districts. Affidavit of McIntosh at pp. 2-3 and Affidavit of Gillie at pp. 1-2.

Moreover, Massachusetts ignores the functioning of Washington's Constitutional Redistricting Commission.[5] As demonstrated by the Affidavit of Helget, the Redistricting Commission spent substantial time and money in its deliberations which culminated in re-drawing the boundaries of Washington's nine congressional districts. Washington has most certainly relied upon the Clerk of the House of Representative's Certificate that it is entitled to nine congressional seats.[6]

(Footnote continued from previous page)
has also filed amicus briefs in each major census case. Montana v. United States Dep't of Commerce, 775 F. Supp. 1358 (D. Mont. filed Oct. 18, 1991) cert. granted 60 U.S.L.W. 3435 (U.S. Dec. 16, 1991) (No. 91-860); New York v. United States Dep't of Commerce, 813 F. Supp. 48 (1990) (D. N.Y. filed Nov. 7, 1988); Massachusetts v. Mosbacher, ____ F. Supp. ____ (No. 91-11234 WD) (D. Mass. Feb. 20, 1992). No reply to Massachusetts' last brief below was filed only because Massachusetts' Brief was received three days after the court's decision.

[5] Amendment 74 to Washington's Constitution changed article 2, section 43 by creating a Redistricting Commission which, inter alia, had the duty of redrawing congressional and legislative election districts by a specified (and past) deadline.

[6] Washington's Legislature adjourned, sine die, on March 12, 1992. To initiate a new redistricting plan for Washington requires a special session of the Legislature and a special act to reconvene the Redistricting Commission (Wash. Rev. Code §

(Footnote continues on next page)

Id., pp. 2-3.

2. Threshold Standards For Issuance of a Stay Order Have Been Met

Massachusetts agrees that the threshold requirement to qualify for a stay is (was) to demonstrate a reasonable probability that four members of the Court will consider the issue sufficiently meritorious to note probable jurisdiction. (Appellee's Brief in Opposition, pp. 23-24.) On Friday, March 20, 1992, the Court noted probable jurisdiction on this appeal and set a briefing schedule and date for oral argument. By taking this action, the Court also satisfied the requirement that there is at least a fair prospect that five justices will conclude that the case was erroneously decided below. Lucas v. Townsend, 486 U.S. 1301, 100 L. Ed. 2d 589, 108 S. Ct. 1763, 1764 (Kennedy, Circuit Justice 1988).

3. A Stay Will Preserve The Status Quo Ante

As of January 1991, and as of today, Washington was, and is, entitled to nine seats, and Massachusetts to ten. As of April 10, the lower court's Orders unless stayed will change that status quo. The relief ordered by the district court acts to upset the status quo ante explicitly required by Congress in 2 U.S.C. § 2(a).

(Footnote continued from previous page)
44.05.120 (1989)). The present possibility of a legislative change to the final nine seat Redistricting Plan is remote.

As pointed out in our supporting affidavits, Washington proceeded to redistrict in reliance upon the Certificate of Entitlement issued January 16, 1991 by the Clerk of the House which provided Washington nine seats. The effect of the lower court's decision is not only to rewrite 2 U.S.C. § 2(a) standards for issuance of Certificates of Entitlement, but explicitly to require new Certificates of Entitlement for Washington and Massachusetts, thus resurrecting the 1980 entitlement for both (even though the states' absolute and relative populations have changed dramatically).

Candidates for public office have accordingly made their decisions based upon the 1991 reality of nine seats. Public and private monies have been spent in reliance upon the President's action and the House Clerk's issuance of Certificates of Entitlement. The status quo ante, prior to Massachusetts' claim, was that Washington was entitled to nine House seats and this will most definitely be altered by the lower court's Order, if not stayed.

Neither is it a valid argument to say that Washington was "on notice" of Massachusetts' and Montana's claims and therefore could not have justifiably relied upon the House Clerk's issuance of Certificates. (Appellee's Brief in Opposition, p. 13.) As occurs each decade, there are numerous cases involving census and apportionment. Even now there is also a New York "adjustment" claim as well as Washington's own lawsuit pending. Washington v. United States Dep't of Commerce, No. C91-315 (D. Wash. filed Mar. 7, 1991.) These actions could have the effect of further

confirming Washington's already final Entitlement (and Massachusetts' loss).

Washington and its candidates and citizens were justified in relying on the actual Certificate of Entitlement issued by the House Clerk in accordance with federal law rather than attempting to plan for each result of this proliferating litigation. As noted above, Washington can legally only make a redistricting plan based upon the census results and Certificate received.

4. The Public Interest Favors Stay

There is a strong public interest in the integrity and finality of the federal reapportionment process. The equal representation rights of the overseas citizens deprived of representation by the Orders below alone override the concerns raised by Massachusetts. It bears notice that Massachusetts argues to deprive over 10,000 of its own citizens of representation just because Washington has an even larger number of temporarily overseas citizens.

The final point is that these are substantial federal questions of public interest presented by this appeal. The statutory requirements for issuance of a Certificate of Entitlement to a House seat have been rewritten by the lower court's decision. The decision depriving persons serving their country of representation is also problematic in light of this Court's language in Carrington v. Rash, 380 U.S. 89 (1965) and Evans v. Cornman, 398 U.S. 419 (1970). These decisions suggest that military servicemen are entitled to protection of their

rights. Surely they are at least entitled to consideration, before an order has the effect of denying those rights.

The materials submitted by Washington demonstrate its reliance on the actions of the President and House Clerk pursuant to 2 U.S.C. § 2(a) and that irreparable harm will flow if this stay is not granted. Denial of the stay would burden Washington, one of the states that the federal statute was intended to protect, through providing finality to the process. There are clear public interests to be served by maintaining the status quo ante in terms of these duly issued Certificates of Entitlement, which strongly favor issuance of the stay.

> But where an injunction is asked which will adversely affect a public interest for whose impairment, even temporarily, an injunction bond cannot compensate, the Court may, in the public interest, withhold relief until a final determination of the rights of the parties, though postponement may be burdensome to the plaintiff. (footnote and citations omitted)

Yakus v. United States, 321 U.S. 414, 64 S. Ct. 660, 88 L. Ed. 834, 857 (1944). Washington's earlier Brief together with that of the United States Solicitor General, indicate that Massachusetts is ultimately unlikely to prevail in this Court.

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CONCLUSION

For the foregoing reasons, the application by the United States for a stay should be granted.

Dated this 25th day of March, 1992.

KEN EIKENBERRY
Attorney General

JAMES M. JOHNSON*
Sr. Assistant Attorney General

J. LAWRENCE CONIFF
CAROLE A. RESSLER
Assistant Attorneys General

Attorneys for Amicus
**Counsel of Record*

Highways-Licenses Bldg.
Seventh Floor
P.O. Box 40100
Olympia WA 98504-0100
(206) 753-4556